

# Criminalization of Human Rights Defenders





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# Criminalization of the Work of Human Rights Defenders

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# EXECUTIVE SUMMARY



## EXECUTIVE SUMMARY

1. This report addresses the problem of the misuse of criminal law by State and non-State actors with the aim to criminalize the work of human rights defenders. The Inter-American Commission on Human Rights (IACHR or “the Commission”) has continued to receive alarming reports of a trend indicating that human rights defenders in various contexts are systematically subjected to unfounded criminal proceedings in order to paralyze or delegitimize their causes. This situation is of great concern to the IACHR because the misuse of the State criminal justice apparatus against human rights defenders not only interferes with their work in defending and promoting human rights, but also affects the leading role they have in the consolidation of democracy and the rule of law.
2. This report conceptualizes the phenomenon of criminalization and identifies the contexts and groups of defenders who are most affected by this practice, as well as the actors who usually participate in the processes of criminalization through the misuse of criminal law. Additionally, the IACHR identifies the main forms of criminalization against human rights defenders and the obligations that States must observe in criminal proceedings to prevent them from becoming tools to hinder the defense of human rights. The report also analyzes the diverse effects of criminalization on defense activities, the personal and professional lives of human rights defenders, as well as their social environment. Finally, it refers to initiatives taken by States to address the misuse of criminal law, identifying appropriate practices under international law standards to eliminate and prevent the misuse of criminal law against human rights defenders.
3. The IACHR focuses primarily in this report on the ways in which criminal law may be used improperly to hamper the defense of human rights and not on administrative or civil obstacles that also interfere with this work. In this regard, the Commission understands that the criminalization of human rights defenders through the misuse of criminal law involves the manipulation of the State’s punitive power by State and non-State actors in order to hinder their advocacy work, thereby preventing the legitimate exercise of their right to defend human rights.
4. According to information received, the misuse of criminal law most often occurs in contexts where there are tensions or conflicts of interest with State and non-State actors. One example is the case of communities occupying lands of interest for the development of mega-projects and the exploitation of natural resources, where criminal law can be improperly applied to impede the advancement of causes contrary to the economic interests involved. This can also occur in contexts of social protest during or after the demonstration, blockade, sit-down, or mobilization for the simple fact of having peacefully participated in it. The IACHR

has also received information regarding the misuse of criminal law against defenders who have filed complaints against public officials.

5. The IACHR has also noted that there are certain groups of defenders who have been more frequently the target of these forms of criminalization due to the causes they advance or the content of their demands, including those who defend rights concerning territories and the environment, the defense of labor rights by union leaders, the defense of sexual and reproductive rights, and the work to advance the rights of LGBT persons (Lesbian, Gay, Bisexual and Trans).
6. Therefore, the Commission has found that criminalization processes usually begins with the filing of baseless allegations or complaints based on criminal offenses that do not conform to the principle of legality or criminal offenses that do not meet inter-American standards. These criminal offenses are often linked to punishable conduct such as "incitement to rebellion", "terrorism", "sabotage", "incitement to crime" and "attack or resistance to public authority," and tend to be arbitrarily applied by the authorities. Often, the misuse of criminal law is preceded by statements made by public officials in which human rights defenders are accused of committing crimes and there is no ongoing proceeding or judicial decision to confirm these allegations. Such statements can motivate the opening of unjustified criminal processes against human rights defenders, solely for being singled out by a high-level official or public authority.
7. Another way in which criminal law is used improperly is by subjecting the defender to lengthy legal proceedings, contrary to the guarantees of due process, in order to suppress or intimidate his or her advocacy and defense of human rights. The Commission has also observed that the manipulation of punitive power occurs when courts dictate precautionary measures without ensuring the appearance of the defendant at trial, thereby limiting the defense work of the person affected. There have also been reports of arbitrary detentions of defenders for the same purpose of restricting their work and discouraging them from continuing to promote their causes.
8. In this report, the IACHR issues a number of recommendations to States to address and prevent the misuse of criminal law against human rights defenders. Among its recommendations, the IACHR urges States to recognize the importance of the work of human rights defenders in democratic societies; it also recommends that laws and policies, whose vagueness or content have allowed for the criminalization of defenders for their legitimate work, be reformulated such that they are fully in accordance with the principle of legality; and to take precautions so that justice operators act according to the principle of legality and ensure that the law is properly applied according to international legal standards.
9. The IACHR expects these recommendations to guide the Member States of the Organization of American States (OAS) in the eradication of the misuse of criminal law against human rights defenders, and in creating an enabling environment free of obstacles for the defense of human rights. The Commission finally reiterates that the guarantee and strength of human rights within a democracy is largely based on the free exercise of the work of human rights defense.

CHAPTER 1  
INTRODUCTION



# INTRODUCTION

## A. *Objective of the Report*

10. Since its creation, the Inter-American Commission on Human Rights (hereinafter "Commission", "Inter-American Commission" or "IACHR") has continuously monitored the situation of human rights defenders in the Americas and underscored the fundamental role they play in the implementation of human rights and for the full existence of democracy and the rule of law. Through its various protection mechanisms, the IACHR has recognized the existence of the human rights defenders' right to defend human rights, which is also recognized in the universal system and other regional human rights systems. Notwithstanding the foregoing, the Commission notes that defenders still face a number of obstacles to exercise their activities to promote and defend human rights in several countries in the region. The different challenges faced by defenders were discussed by the IACHR in its first report on the *Situation of Human Rights Defenders in the Americas*,<sup>1</sup> published on March 7, 2006 (hereinafter "2006 Report") and in its *Second Report on the Situation of Human Rights Defenders in the Americas*,<sup>2</sup> approved on December 31, 2011 (hereinafter "2011 Report").<sup>3</sup>
11. In recent years, through its continuous monitoring work, the IACHR has noticed a growing sophistication in the actions taken to prevent, obstruct, and discourage the defense and promotion of human rights. One of the actions frequently reported to the Inter-American Commission is the adoption and misapplication of the law to the detriment of human rights defenders in order to obstruct their activities. Based on these considerations, given that criminal law is the most restrictive and severe means available to the State for establishing liability for unlawful conduct,<sup>4</sup> this report will focus on the various forms of manipulation of the punitive power, and to what the Commission will refer to as the criminalization and misuse of criminal

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<sup>1</sup> IACHR, *Report on the Situation of Human Rights Defenders in the Americas*, OAS/Ser.L/V/II.124.Doc.5 rev. 1 March 7, 2006.

<sup>2</sup> IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas*, OAS/Ser.L/V/II.Doc. 66, December 31, 2011.

<sup>3</sup> Thus, in its 2006 Report, the Commission identified the obstacles that defenders face most often: a) extrajudicial executions and enforced disappearances; assaults, threats and harassment; b) smear campaigns; c) violation of the home and other arbitrary interference; d) intelligence activities; e) restrictions on access to information and habeas data; f) arbitrary administrative and financial controls to human rights organizations; and g) impunity in investigations of attacks against defenders. In turn, the Commission noted in its 2011 Report that the barriers identified in the 2006 Report persist and in some cases have intensified.

<sup>4</sup> I/A Court H.R., *Case of Ricardo Canese v. Paraguay*. Merits, Reparations and Costs. Judgment of August 31, 2004. Series C No. 111, para. 104; I/A Court H.R., *Case of Palamara Iribarne v. Chile*. Merits, Reparations and Costs. Judgment of November 22, 2005. Series C No. 135, para. 79.



law. The Commission will also discuss considerations related to the stigmatizing statements and speeches against human rights defenders which often precede the initiation of criminal proceedings. However, it is important to note that the Commission will not analyze the administrative and civil obstacles which also interfere with the work of defending human rights.

12. The criminalization of human rights defenders through the misuse of criminal law involves the manipulation of the punitive power of the State by State and non-State actors in order to control, punish, or prevent the exercise of the right to defend human rights. This takes place, for example, through the filing of baseless allegations or complaints based on criminal offenses that do not conform with the principle of legality or criminal offenses that do not meet Inter-American standards *vis-à-vis* the behaviors they intend to punish. It can also be displayed in the subjection of defenders to extended criminal proceedings and in the use of preventive measures with no procedural ends. The manipulation of criminal law to the detriment of defenders has become an obstacle that merits priority attention from the States, as it intimidates and paralyzes the work of human rights defenders, since their time, resources (financial and otherwise), and energy have to be devoted to their own defense.<sup>5</sup>
13. The IACHR has monitored the phenomenon of criminalization through the implementation of its various mechanisms, including its thematic reports. The Commission has consistently reminded States of their duty to investigate those who violate the law within their territory, which means that whenever a complaint is filed or when a prosecutable offense is committed, the State has an obligation to promote and encourage criminal proceedings.<sup>6</sup> These processes must have a full, impartial,<sup>7</sup> prompt, thorough, independent and timely investigation of the facts.<sup>8</sup> However, as the Commission noted in its 2006 Report, States also have an obligation to adopt all necessary measures to prevent that State investigations lead to unjust or unfounded trials of persons who legitimately call for the respect and protection of human rights. In that report, the IACHR urged States to ensure that their authorities or third parties do not manipulate the punitive power of the State and its justice system in order to harass those who are dedicated to legitimate activities, such as is the case of human rights defenders.<sup>9</sup>
14. Similarly, in its 2011 Report, the Commission emphasized that "that States should: conduct a review to ensure that the crimes commonly invoked to arrest human

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<sup>5</sup> IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas*, OAS/Ser.L/V/II.Doc.66, December 31, 2011, para. 76.

<sup>6</sup> IACHR, Report No. 52/97, Case 11.218, Admissibility, Arges Sequeira Mangas, Nicaragua, February 18, 1998, para. 99; IACHR, *Annual Report 1997*, OAS/Ser.L/V/II.98, February 17, 1998, vices. 96 and 97; IACHR, Report No. 55/97, Case 11.137, Admissibility, Juan Carlos Abella, Argentina, November 18, 1997, para. 392.

<sup>7</sup> I/A Court H.R., *Case Godinez Cruz v. Honduras*. Preliminary Objections. Judgment of June 26, 1987. Series C No. 3, para. 20.

<sup>8</sup> I/A Court H.R., *Case Fleury et al v. Haiti*. Merits and Reparations. Judgment of November 23, 2011. Series C No. 236, para. 111; I/A Court H.R., *Case Yvon Neptune v. Haiti*. Merits, Reparations and Costs. Judgment of May 6, 2008. Series C No.180, para. 38.

<sup>9</sup> IACHR, *Report on the Situation of Human Rights Defenders in the Americas*, OAS/Ser.L/V/II.124. Doc. 5 rev. 1 March 7, 2006, Chapter X. Recommendation No. 11.

- rights defenders are formulated in accordance with the principle of legality; ensure that the authorities presiding over the cases issue their decisions within a reasonable period of time; and guarantee that the authorities and third parties do not violate the principle of presumption of innocence by making statements that stigmatize as criminals human rights defenders who are being criminally prosecuted."<sup>10</sup>
15. The IACHR notes that criminalization processes are not solely restricted to the manipulation of the criminal justice system, but are also often accompanied by previous actions, such as statements by senior officials accusing human rights defenders of committing crimes or illegal activities with the purpose or effect of delegitimizing their work. The Commission has also noted that human rights defenders have been subjected to arbitrary arrests by security forces as a mechanism to prevent them from doing their work or deprive them of their liberty in crucial moments for the defense of their causes.
  16. The manipulation of the legal system in order to criminalize defenders is a complex obstacle that runs against the principle of *ultima ratio* that affects in a particularly adverse way the work of human rights defenders and impacts the free exercise of the defense of human rights in various ways. This problem has been a concern not only for the Inter-American Commission but also for other international organizations and United Nations agencies.<sup>11</sup>
  17. In this sense, both the United Nations Special Rapporteur on the situation of human rights defenders and the Human Rights Council have expressed concern that, in some countries, legislation has been misused against defenders or has hindered their work and endangered their safety in contravention of international law. At the same time they have recognized the urgent need to address and take concrete measures to prevent and stop the use of criminal law to obstruct or unduly limit the ability of the human rights defenders to carry out their work, including through the review and, where necessary, modification of the relevant legislation and its application.<sup>12</sup>
  18. Given the persistence and intensification of the phenomenon of criminalization through the misuse of criminal law, the Commission considers the publication of

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<sup>10</sup> IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas*, OAS/Ser.L/V/II.Doc. 66, December 31, 2011. Chapter VI. Recommendation No. 13.

<sup>11</sup> UN General Assembly, Report of the Special Rapporteur on the Situation of Human Rights Defenders, Margaret Sekaggya, A/HRC/25/55, December 23, 2013, para. 64. In turn, the UN Special Rapporteur on the situation of human rights defenders Michel Forst, and the Rapporteur on Human Rights Defenders of the IACHR through a joint press release expressed their concern over the persistent criminalization of activities undertaken in defense of human rights in various countries of the region and the failure of States to adopt effective protective measures by human rights defenders who are in situations of serious risk. See: IACHR, Press Release 127/14 – UN and IACHR Rapporteurs call upon States to protect human rights defenders, Washington DC, October 31, 2014.

<sup>12</sup> UN General Assembly, Resolution adopted by the Human Rights Council, Protection of human rights defenders, A/HRC/RES/22/6, p. 2; OAS General Assembly, AG/RES.2851 (XLIV-O/14) Human Rights Defenders: Support for Individuals, Groups, and Organizations of Civil Society Working to Promote and Protect Human Rights in the Americas, adopted at the second plenary session, held on June 4, 2014, p. 2.

this report an urgent need in order to identify the contexts in which the misuse of the criminal law is observed, the actors involved in these processes, the main forms of criminalization against defenders, the effects of criminalization on human rights defenders, and the initiatives and responses adopted by States on this issue. The IACHR will conclude with a section of recommendations that it hopes will serve as a guide to the Member States of the Organization of American States in preventing the improper use of criminal law against human rights defenders.

## ***B. The Importance of Human Rights Defenders and Recognition of the Right to Defend Human Rights***

19. Human rights defenders are individuals who in any way promote or seek the realization of nationally or internationally recognized human rights and fundamental freedoms. The identifying criteria of who should be considered a human rights defender is the activity of the person as opposed to other qualities, such as whether she or he receives payment for his or her work, or whether he or she belongs to a civil society organization.<sup>13</sup> This concept also covers justice operators as defenders of the access to justice for thousands of victims of violations of their rights.<sup>14</sup>
20. Human rights defenders on the one hand "contribute to the improvement of social, political and economic conditions, the reduction of social and political tensions, the building of peace, domestically and internationally, and the nurturing of national and international awareness of human rights."<sup>15</sup> Also, they "can assist governments in promoting and protecting human rights. As part of consultation processes they can play a key role in helping to draft appropriate legislation, and in helping to draw up national plans and strategies on human rights."<sup>16</sup>
21. On the other hand, human rights defenders contribute in a special way to the promotion, respect, and protection of human rights and fundamental freedoms in the Americas and in supporting victims and representing and defending those whose rights are threatened or violated.<sup>17</sup> The defenders' monitoring, reporting, dissemination, and education activities are an essential contribution to the observance of human rights, as they seek to combat impunity.<sup>18</sup>

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<sup>13</sup> IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas*, OAS/Ser.L/V/II.Doc. 66, December 31, 2011, para. 12.

<sup>14</sup> IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas*, OAS/Ser.L/V/II.Doc. 66, December 31, 2011, para. 9.

<sup>15</sup> UN, *Human Rights Defenders: Protecting the Right to Defend Human Rights*, Fact Sheet No. 29, p. 8.

<sup>16</sup> Council of the European Union, *the European Union Guidelines on Human Rights Defenders*, adopted in June 2004, para. 5.

<sup>17</sup> OAS General Assembly, AG/RES. 1920 (XXXIII-O/03) Human rights defenders: support for the individuals, groups, and organizations of civil society working to promote and protect human rights in the Americas, June 10, 2003.

<sup>18</sup> I/A Court H.R., *Case Fleury et al v. Haiti*. Merits and Reparations. Judgment of November 23, 2011. Series C No. 236, para. 80.

22. The Inter-American Commission has indicated that human rights defenders need to exercise the necessary social oversight of public officials and democratic institutions, in which they "play an irreplaceable role in building a solid and lasting democratic society,"<sup>19</sup> and therefore when a person is prevented from defending human rights, it directly affects the rest of society.
23. In view of the importance of the work of human rights defenders, the existence of a right to defend human rights has been recognized both at the national and international levels. This recognition was expressed in 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* (hereinafter "UN Declaration on Human Rights Defenders") adopted by the Assembly General of the United Nations on December 9, 1998, which states that "Everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels."<sup>20</sup>
24. The recognition of the right to defend rights has expanded internationally to the European, African and Inter-American systems. In the case of Europe, the European Union Guidelines on Human Rights Defenders adopted in 2004, include within their purpose "to support and strengthen ongoing efforts by the Union to promote and encourage respect for the right to defend human rights."<sup>21</sup> At the same time, in the case of Africa, the African Union adopted the Grand Bay Declaration in 1999 recognizing the UN Declaration on Human Rights Defenders and the importance of developing and energizing civil society as key elements in the process of creating a favorable environment for human rights in Africa.<sup>22</sup>
25. In the Americas, the General Assembly of the Organization of American States has recognized the right to defend rights and the importance of this right in various resolutions since 1999. In this regard, in its resolution 1671 of June 7, 1999 the General Assembly, taking into account the principles established in the UN Declaration on Human Rights Defenders, urged Member States "to persist in their efforts to provide human rights defenders with the necessary guarantees and facilities to continue freely carrying out their work of promoting and protecting human rights, at the national and regional levels, in accordance with internationally recognized principles and agreements."<sup>23</sup>

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<sup>19</sup> IACHR, *Report on the Situation of Human Rights Defenders in the Americas*, OAS/Ser.L/V/II.124.Doc.5 rev. 1 March 7, 2006, para. 23.

<sup>20</sup> United Nations General Assembly, A/Res/53/144, *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, March 8, 1999, Article 1.

<sup>21</sup> Council of the European Union, the *European Union Guidelines on Human Rights Defenders*, adopted in June 2004, para. 1.

<sup>22</sup> OAU, *Grand Bay Declaration and Plan of Action*, adopted at the Ministerial Conference on Human Rights of the African Union, held from 12 to 16 April 1999 in Grand Bay, Mauritius.

<sup>23</sup> OAS General Assembly, AG/RES.1671 (XXIX-O/99) Human rights defenders in the Americas, support for the individuals, groups, and organizations of civil society working to promote and protect human rights in the Americas, June 7 1999. Res. 2.

26. In the case of the inter-American system, the right to defend human rights has been recognized by both the Commission and the Inter-American Court of Human Rights. The IACHR has defined the scope of the right to defend human rights stating that its exercise may not be subject to geographical restrictions and that it involves the possibility to freely and effectively promote and defend any rights whose acceptance is unquestioned; the rights and freedoms contained in the UN Declaration on Human Rights Defenders; as well as new rights or components of rights whose formulation is still being discussed.
27. For its part, the Inter-American Court has emphasized that "the defense of human rights not only serves civil and political rights, but necessarily covers the monitoring, reporting, and education of economic, social, and cultural rights, in accordance with the principles of universality, indivisibility, and interdependence enshrined in the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights."<sup>24</sup>
28. In accordance with the UN Declaration on Human Rights Defenders, everyone has the right to promote and strive for the protection and realization of human rights and fundamental freedoms, as well as "to develop and discuss new human rights ideas and principles and to advocate their acceptance."<sup>25</sup> To ensure the free exercise of human rights, including the right to defend human rights, compliance with the State's obligation to respect and guarantee the enjoyment of their human rights is required, for which "it is not sufficient that States abstain from violating rights; rather it is imperative that they adopt positive measures, determined based on the particular needs for protection of the subjects of law, owing to either their personal situation, or on the specific situation in which they find themselves."<sup>26</sup>

### ***C. Link between Democracy and the Role of Human Rights Defenders***

29. The IACHR has emphasized that the work of human rights defenders is fundamental for the universal implementation of human rights, and for the full existence of democracy and the rule of law.<sup>27</sup> Human rights defenders are an essential pillar for the strengthening and consolidation of democracies, since the purpose that motivates their work involves society in general, and seeks to benefit it.

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<sup>24</sup> I/A Court H.R., *Case Kawas Fernández v. Honduras*. Merits, Reparations and Costs. Judgment of April 3, 2009. Series C No. 196, para. 147; I/A Court H.R., *Nogueira de Carvalho and another v. Brazil*. Judgment of November 28, 2006. Series C No. 161, para. 77.

<sup>25</sup> UN, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, March 1999 Article 7.

<sup>26</sup> I/A Court H.R., *Case Suarez Peralta v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of May 21, 2013. Series C No. 261, para. 127.

<sup>27</sup> IACHR, Second Report on the Situation of Human Rights Defenders in the Americas, OAS/Ser.L/V/II.Doc. 66, December 31, 2011, para. 13.

30. The misuse of criminal law to criminalize human rights defenders not only undermines the credibility and legitimacy of their work, but threatens their central role in consolidating the rule of law and strengthening democracy. Furthermore, it deters the promotion and protection of human rights. When defenders are criminalized for their legitimate activities related to the defense of human rights, this spreads fear among other human rights defenders that can result in silencing their causes and claims, which impedes the full realization of the rule of law and democracy. Additionally, this situation may encourage impunity, since it dissuades defenders from lodging complaints and victims of human rights violations from seeking the support of human rights defenders to present their claims, seriously hindering their ability to access justice.
31. In this regard, the IACHR has recommended that States publicly recognize that the peaceful protection and promotion of human rights are legitimate actions<sup>28</sup> and foster a human rights culture in which the fundamental role played by human rights defenders in guaranteeing democracy and the rule of law is recognized publicly and unequivocally. The commitment to this policy should be reflected at every level of the State—local, state, and national—and in every branch of government—executive, legislative, and judicial.<sup>29</sup>

#### ***D. Methodology and Structure of the Report***

32. For the preparation of this report, the Commission conducted a series of activities to gather information regarding the problem of criminalization and the misuse of criminal law against human rights defenders in the Americas. The IACHR also implemented activities to review the relevant international law standards on the subject in order to formulate the recommendations that are included in this report.
33. In this regard, on August 1, 2014 the Commission shared a consultation questionnaire with States and civil society, with the purpose of collecting relevant information in order to analyze the problem of criminalization, inquire about best practices, and promote the full use of international standards to guide States on the lines of action to follow to avoid misuse of criminal law.<sup>30</sup>
34. The IACHR extends a special thanks to those States that responded to the questionnaire,<sup>31</sup> as well as public entities<sup>32</sup> and civil society organizations who also submitted their answers.<sup>33</sup>

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<sup>28</sup> IACHR, *Report on the Situation of Human Rights Defenders in the Americas*, OAS/Ser.L/V/II.124.Doc.5 rev. 1 March 7, 2006, Chapter X, Recommendation No. 1 and 2.

<sup>29</sup> IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas*, OAS/Ser.L/V/II.Doc. 66, December 31, 2011. Recommendation 3.

<sup>30</sup> IACHR, Consultation questionnaire for States and civil society, published on August 1, 2014.

<sup>31</sup> Antigua and Barbuda, Argentina, Colombia, Chile, United States, Guatemala, Honduras, Panama, St. Kitts and Nevis, and Venezuela.

<sup>32</sup> Judiciary Council of the state of Oaxaca, Office of the Human Rights Ombudsman of Oaxaca, Human Rights Commission of the Federal District of Mexico, Public Defender's Office of the Republic of Argentina, Office of

35. Also, as part of the preparatory activities, on October 24, 2014, the Rapporteurship on Human Rights Defenders of the IACHR held a discussion on the misuse of criminal law to criminalize human rights defenders in order to consult with the participants about this phenomenon, in light of current international law standards.<sup>34</sup> Also, as part of its 153 Period of Sessions, the IACHR convoked a hearing on the abuse of criminal law to criminalize human rights defenders in order to receive inputs in the context of the preparation of this report.<sup>35</sup>

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the Ombudsman of Costa Rica, Human Rights Ombudsman of Guatemala, Secretary of Interior – Human Rights Protection Unit- Mexico.

<sup>33</sup> A Dignitatis – Assessoria Técnica Popular; Acción Ecológica; Acción Urgente para Defensores de los Derechos Humanos AC. (ACUDEH); American Bar Association Center for Human Rights; Ana Lucia Marchiori; Artigo 19, Conectas Direitos Humanos (Brasil), Serviço de Assessoria Jurídica Universitária da Universidade Federal do Rio Grande do Sul (Brasil); Asamblea Permanente de Derechos Humanos La Paz; Asociación Civil Orgullo Guayana; Asociación Interamericana para la Defensa del Ambiente (AIDA); Asociación para una Ciudadanía Participativa (ACI-Participa); Asociación Regional Liberación en pro de los Derechos Humanos, Económicos, Sociales y Políticos, A.C.; Biopsicosis ONG, Veeduría La Lupa, Veeduría La Lupa II, Veeduría Hoplitás; Central de Trabajadores de la Argentina (CTA Autónoma)- Libre pueblo ; Central Unitaria de Trabajadores-Confederación de Trabajadores de Colombia; Centro de Derechos Humanos de los Pueblos del Sur de Veracruz "Bety Cariño"; Centro de Derechos Humanos Fray Bartolomé de las Casas, A.C.; Centro de Derechos Humanos Miguel Agustín Pro Juárez (Centro PRODH); Centro de Derechos Humanos y Asesoría a Pueblos Indígenas A.C.; Centro Fray Julián Garcés, Derechos Humanos y Desarrollo local A.C.; Centro Mexicano de Derecho Ambiental (CEDMA); Centro Nacional de Ayuda a las Misiones Indígenas A.C.; Centro Regional de Derechos Humanos Bartolomé Carrasco Briseño A.C.; Centro Santo Dias de Direitos Humanos da Arquidiocese de São Paulo; Clínica Jurídica de la Universidad San Francisco de Quito; Comisiatura de Derechos Humanos y Sindicales- Confederación General de Trabajadores de Guatemala; Comisión Ecuménica de Derechos Humanos (CEDHU); Comisión Mexicana de Defensa y Promoción de los Derechos Humanos A.C.; Comité de Desarrollo Campesino (CODECA); Comité de Familiares de Personas Detenidas Desaparecidas en México "Alzando Voces" con sede en Michoacán México; Confederación de Trabajadores Rerum Novarum (CTRN); Confederación General del Trabajo; Confederación Sindical de Trabajadores/as de las Américas – CSA; Consorcio para el Diálogo Parlamentario y la Equidad Oaxaca AC- Liga Mexicana por la Defensa de los Derechos Humanos, filial Oaxaca, AC- Comité de familiares, amigos de Damián Gallardo Martínez; Convergencia por los Derechos Humanos de Guatemala; Coordinadora de Derechos Humanos de Paraguay ; Fundación ProBono de Venezuela; Fundación Regional de Asesoría de en Derechos Humanos (INREDH); Fundación Myrna Mack; Grupo Internacional para la Responsabilidad Corporativa en Cuba; Gustavo Rodríguez; Hernando Ramírez Arboleda; Human Rights Foundation; Institución Universitaria CESMAG; Ipatia Videla; Julián Edgardo Tejedor Estupiñán; Justiça Global; Latin American Mining Monitoring Programme; Lauren Bartlett, Project Director, Center for Human Rights & Humanitarian Law; Sarah Paoletti, Director of the Transnational Legal Clinic at the University of Pennsylvania Law School; Lori Johnson, The Farmworker Unit, Legal Aid of North Carolina y Nathaniel Norton; Lauren Carasik, International Human Rights Clinic Western New England University School of Law; María Raquel Martínez; Martha Inés Socorro Palomino; Mireya Beltrán Rodríguez; Peace Brigades International (PBI); Protection International; Red de la No Violencia contra las Mujeres (REDNOVI); Unión Latinoamericana de Mujeres, Universidad de Costa Rica, sede Guanacaste and Universidade Federal da Paraíba, Centro de Ciências Jurídicas.

<sup>34</sup> In this roundtable discussion the following individuals participated: José de Jesús Orozco Henríquez, Commissioner and Rapporteur on Human Rights Defenders of the IACHR; Michel Forst, UN Special Rapporteur on the Situation of Human Rights Defenders; Juan Méndez, Professor of Human Rights at American University and UN Special Rapporteur on Torture and Cruel, Inhuman and Degrading Treatment, Viviana Krsticevic, Director of the Center for Justice and International Law (CEJIL); Claudia Paz and Paz Bailey, former Attorney General of the Republic of Guatemala and researcher at Georgetown University; Danilo Rueda, National Coordinator of the Inter-Ecclesiastical Commission for Justice and Peace; Katya Salazar, Executive Director of the Due Process of Law Foundation (DPLF); Edison Lanza, Special Rapporteur on Freedom of Expression of the IACHR; Emilio Alvarez Icaza L., Executive Secretary of the IACHR; and Elizabeth Abi-Mershed, Deputy Executive Secretary of the Commission.

<sup>35</sup> IACHR, 153 Period of Sessions, Hearing on the "Improper Use of Criminal Law to Criminalize Human Rights Defenders (On the Commission's initiative)", Oct. 31, 2014.



36. In preparing the report, the Commission has taken into account the information that it has received in its on-site visits, as well as situations recorded by the IACHR in the exercise of its jurisdiction over petitions and cases, precautionary measures, public hearings, thematic and country reports, and in the context of press releases and requests for information from States made based on the powers conferred on the Commission by Article 41 of the American Convention and Article 18 of the Statute of the Inter-American Commission. The IACHR has also used the statements of various international organizations that are mandated to monitor international treaties. Finally, the IACHR has also considered the information provided to the Commission by the States and various civil society organizations, as well as public information available in public institutions and in the media, the latter being duly verified.
37. By virtue of the wealth of information provided by civil society in relation to the abuse of the criminal law against human rights defenders, this report refers to the characteristics and trends that have been identified and refers to some specific situations as an example, without the factual information contained therein intended to be exhaustive or cover all the events about which the Commission learned during this monitoring period. The Commission considers that the trends identified through the examples can serve as a reference for States and civil society on patterns of criminalization of the activities of human rights defenders, in order to promote normative reforms, as well as the design and implementation of public policies that guarantee the exercise of the defense and promotion of human rights.
38. With that purpose, in the second chapter the IACHR conceptualizes the phenomenon of criminalization and identifies the context and groups of defenders who are most affected by this practice, as well as the actors who usually intervene in the processes of criminalization through the misuse of the criminal justice system.
39. In the third chapter, the IACHR identifies the main forms of criminalization of human rights defenders and the obligations that States must observe in criminal proceedings to prevent them from becoming tools to hinder the defense of human rights.
40. In the fourth chapter, the IACHR analyzes the different effects of criminalization in defense activities, as well as in the personal lives and social environments of human rights defenders. In the fifth chapter, some initiatives taken by States to address the misuse of criminal law are analyzed, and practices that would be appropriate in light of the standards of international law to eliminate and prevent the misuse of criminal law against human rights defenders are identified. Finally, in the sixth chapter the Inter- American Commission makes a number of recommendations to the Member States of the Organization of American States.





CHAPTER 2  
MISUSE OF CRIMINAL LAW TO  
CRIMINALIZE THE WORK OF  
HUMAN RIGHTS DEFENDERS



## MISUSE OF CRIMINAL LAW TO CRIMINALIZE THE WORK OF HUMAN RIGHTS DEFENDERS

41. The Commission has continued to receive alarming information on a trend it identified in its *Second Report on the situation of human rights defenders in the Americas*, indicating that human rights defenders are often systematically subject to baseless criminal proceedings with the aim of hindering their work and delegitimizing their causes. This, in turn, makes them more vulnerable to assaults and attacks against them. The opening of these proceedings is based on criminal offenses having a vague or ambiguous wording, such as "incitement to rebellion," "terrorism," "sabotage," "incitement to crime," and "assaulting or resisting public authority," which are used arbitrarily by the authorities.
42. This practice has been observed ever more systematically and repeatedly, resulting in greater and more intense visibility of this obstacle in the region. In this chapter, the Commission will refer to what it has understood by criminalization of activities in defense of human rights through the misuse of criminal law. In addition, it will analyze the different contexts and groups that have been particularly affected by the misuse of the criminal law and the main actors involved in the processes of criminalization against human rights defenders.
43. As noted by the Commission, the criminalization of human rights defenders through the misuse of criminal law involves the manipulation of the State's punitive power by State and non-State actors in order to hinder their work in defense and thus prevent the legitimate exercise of their right to defend human rights.<sup>36</sup> The manipulation of the criminal justice system is intended to delegitimize and halt the course of action of the individual that has been accused, and thus paralyze or weaken his or her causes.<sup>37</sup> Criminalization processes usually begin with the filing of allegations or complaints based on offenses not compliant with the principle of legality or criminal offenses that do not meet the Inter-American standards with regard to the behavior they intend to punish. In many cases, the onset of these criminal proceedings is preceded by stigmatizing statements made by public officials; the proceedings at issue have an indefinite duration; and they are accompanied by the use of preventive measures with no procedural purposes, solely adopted to affect the defenders in crucial moments for the causes they advance.

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<sup>36</sup> IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas*, OAS/Ser.L/V/II.Doc. 66, December 31, 2011, paras. 76-88.

<sup>37</sup> Protection International and UDEFEGUA *Criminalización en contra de Defensores y Defensoras de Derechos Humanos Reflexión sobre Mecanismos de Protección* (Spanish only), Guatemala 2009, p. 7; Amnesty International, *Defending Human Rights in the Americas: Necessary, Legitimate and Dangerous*, 2014, p. 11.

## **A. Contexts in which the Misuse of Criminal Law is Observed and Groups most Affected by this Practice**

44. The Commission considers relevant to highlight the main contexts in which it has noted that criminal law is misused, as well as the profile and the type of work of the human rights defenders who are most affected by this practice, so that States are alerted and able to take action and develop initiatives to prevent it. In this regard, the Commission has noted that the misuse of criminal law usually occurs in contexts where there are tensions or conflicts of interest with State and non-State actors who make use of the legal system to hinder the work of defense made by of human rights defenders and thus curb their causes for considering them opposite to their interests. The IACHR has also noted that there are certain groups of defenders who have been most often subject to these types of obstacles as a result of the causes they support or the content of their claims. This report will analyze some of the contexts in which the criminal justice system is activated without justification, and will refer to groups of human rights defenders who have been exposed to the criminalization as a result of their activities of defense and promotion.
45. The Commission in its 2011 Report noted that during the last years, there is a growing trend in some countries to bring criminal charges against people who participate in social protests<sup>38</sup> to demand their rights, on grounds that these protests are allegedly disturbing the public order, or threatening the security of the State.<sup>39</sup> The Commission has observed that this trend remains in many countries in the region,<sup>40</sup> a situation that is evidenced by the frequent arrests that human rights defenders are subject to in the legitimate exercise of their right to freedom of expression and peaceful assembly, as well as through application of criminal charges which are contrary to the principle of legality, and which are used to restrict the legitimate exercise of the right to social protest.
46. Therefore, the IACHR has observed that the arrests are carried out both during and after the development of the demonstration, blockade, sit-down, or mobilization for the simple fact of having peacefully participated in it and exercised the right to peaceful social protest. In general, the arrests and the initiation of criminal proceedings are based on the protection of public order and national security, and

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<sup>38</sup> See, for example, Centro PRODH's response to the questionnaire for the preparation of report on criminalization of human rights defenders through the misuse of the criminal law, September 2014. IACHR, 154 Period of Sessions, Situation of the right to freedom association and assembly in Peru on March 17, 2015. In particular the participating organizations referred to the use of criminal action to criminalize and intimidate those who participate or promote social protests and harassment, and the stigmatization of human rights defenders, including of the environment.

<sup>39</sup> IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas*, OAS/Ser.L/V/II.Doc. 66, December 31, 2011, para. 107.

<sup>40</sup> Response from the Office of the Human Rights of Guatemala to the questionnaire for the preparation of the report on criminalization of human rights defenders through the misuse of the criminal law, October 2014. In this regard, the office cites data collected by the Guatemala Defenders Unit (UDEFEQUA), which recorded in 2013, the initiation of 61 lawsuits that had no foundation, whose aim was to demobilize the social protest and leave social organizations leaderless.

the criminal offenses the defenders are accused of range from "attacks," "rebellion," "obstruction of roads," to "terrorism." For instance:

The Commission has received information on the use of preventive custody or the temporary detention of individuals, including political dissidents and human rights defenders, in the context of peaceful social protests in Cuba. According to the Cuban Observatory of Human Rights, between January and September 2014 nearly 6,500 arbitrary arrests of political dissidents were made in the context of peaceful demonstrations.<sup>41</sup> In the month of January 2014 alone, 1052 arbitrary detentions were reported to have occurred, representing the largest number of arrests in the last four years.<sup>42</sup> As reported, the arrests were carried out by agents of the Cuban government from the Department of State Security and the National Revolutionary Police. Most arrests are made for short periods of time and appear to be intended to intimidate human rights defenders, thwart their activities, and prevent their assembly and participation in their advocacy activities.<sup>43</sup> This situation has particularly affected members of the 'Damas de Blanco' (Ladies in White) group who have been subjected to mass arrests as a way to deter them from exercising their right to freedom of association and assembly. For example, the Commission received information indicating that on July 14, 2014, about 100 Damas de Blanco had been arrested while performing their Sunday walk after going to Mass in the parish of Santa Rita. Allegedly a group of uniformed policemen and plainclothes agents arrested the members of the organization amidst a counter-demonstration from government supporters.<sup>44</sup>

47. Human rights defenders have also been victims of criminalization after filing complaints against public officials for alleged corruption or in the pursuit of the clarification, investigation, prosecution, and punishment of cases of grave human rights violations and breaches of humanitarian law by States during internal armed conflicts or democratic breakdowns. In this regard, the IACHR has recognized the efforts of the victims, family members, human rights defenders, and civil society organizations and their contribution to the guarantee of the right to the truth regarding grave human rights violations in the hemisphere,<sup>45</sup> as their activity is essential in the search for the right to truth. As reported:

<sup>41</sup> Observatorio Cubano de Derechos Humanos, *Exiliados y disidentes denuncian en Ginebra '6.500 detenciones arbitrarias' en lo que va de año* (Spanish only), September 6, 2014.

<sup>42</sup> Cuban Commission for Human Rights and National Reconciliation, *Cuba: Algunos actos de represión política en el mes de abril de 2014* (Spanish only), April 2014.

<sup>43</sup> Human Rights Foundation response to the questionnaire for the preparation of the report on criminalization of human rights defenders through the misuse of criminal law, September 2014.

<sup>44</sup> El Nuevo Herald, *US and EU condemn arrest of the Ladies in White in Cuba*, July 15, 2014.

<sup>45</sup> IACHR, *The Right to Truth in the Americas*, OAS/Ser.L/V/II.152/Doc.2, August 13, 2014, para. 220.

Concerning Brazil, the Commission learned of the initiation of baseless legal actions against Daniel Biral, a lawyer and member of Advogados Ativistas, an organization working to promote and defend the right to freedom of expression. These charges followed an event on July 1, 2014, when Daniel Biral and a colleague, Silvia Daskal, were attending a public meeting with 500 participants to discuss and denounce abuses committed by the Sao Paulo military and civil police during recent protests against the World Cup. At this event, they were arrested by military police after asking one officer why he was not displaying his identification information that all officers are required to carry during public order operations. On the way to the police station, Daniel Biral was allegedly physically beaten by police officers until he lost consciousness. The police chief at the station refused to accept Mr. Biral's complaint against the officers and only recorded the statement of the military police. Later that same day, Mr. Biral was released from detention, but a charge for contempt was levied against him, and an investigation opened, for having questioned the officer. This investigation was closed in November 2014.<sup>46</sup>

48. Likewise, the IACHR has observed that, in the context of the defense of certain rights, some defenders have been particularly criminalized for the type of defense and the work they perform and therefore are often victims of the misuse of criminal law.<sup>47</sup> These contexts are: the defense of the rights to land and the environment<sup>48</sup> by *campesino* (farmer), indigenous, and Afro-descendants leaders; the defense of labor rights by union leaders; the defense of sexual and reproductive rights; and the defense of the rights of LGBT persons (Lesbian, Gay, Bisexual and Trans).
49. For example, the Commission has frequently noted the criminalization of activities in defense of the rights of communities occupying territories of interest for the development of mega-projects<sup>49</sup> and the exploitation of natural resources,<sup>50</sup> such

<sup>46</sup> Amnesty International, *Defending Human Rights in the Americas: Necessary, Legitimate and Dangerous* (2014), AMR 01/003/2014, p. 11.

<sup>47</sup> Response of the Myrna Mack Foundation questionnaire for the preparation of the report on criminalization of human rights defenders through the misuse of criminal law, September 2014.

<sup>48</sup> As reported by the Mexican Center for Environmental Law "the Mexican criminal law context is used often criminalizing protest against development of projects, through the intervention of the state apparatus as public ministries who accuse senior leaders and opponents of development projects and policies implemented by the government; also through threats, intimidation, harassment and assaults or attacks (...)." Response of the Mexican Center for Environmental Law (CEMDA) to the consultation questionnaire for the preparation of the report on criminalization of human rights defenders through the misuse of criminal law, September 2014.

<sup>49</sup> Robert F. Kennedy Center for Justice & Human Rights, *Tilted Scales: Social Conflict and Criminal Justice in Guatemala*, p.9. In a similar sense, the Working Group of the United Nations on the issue of human rights and transnational corporations and other businesses, in its report of May 5, 2014 expressed concern about the communications received regarding alleged murders, attacks, and acts of intimidation against human rights defenders who are campaigners on the negative impacts of mining companies, specifically mining and

as mining,<sup>51</sup> hydroelectric or logging projects.<sup>52</sup> In this regard, the IACHR has received information indicating that in these contexts the criminal justice system is used against indigenous, Afro-descendant, *campesino* and community leaders,<sup>53</sup> as well as against human rights defenders working on the protection of the land, natural resources, and the environment, in retaliation for their opposition to extractive activities and their complaints about the negative impact that these projects have on the ecology, health, their community relations, or their enjoyment of other rights.<sup>54</sup> In many cases, when defenders oppose these activities, they are perceived by States and by transnational companies as destabilizers of rights and development. In considering them an obstacle to these economic or political interests, criminal proceedings are initiated against the defenders to dissuade them from continuing to pursue their complaints and opposition activities.<sup>55</sup>

50. In this regard, according to the UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, "One of the more serious human rights protection deficiencies in recent years is the trend towards the use of laws and the justice system to penalize and criminalize social protest activities and legitimate demands made by indigenous organizations and movements in defense of their rights."<sup>56</sup> That shortcoming is alleged to take shape by applying emergency

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hydroelectric projects on indigenous peoples. The Working Group also expressed concern over increased attacks and intimidation by State and non-State actors against those participating in protests against current and future impacts of mega-development projects that have on communities. See A/HRC/26/25, Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, May 5, 2014, para. 69-70.

50. Press Conference by UN Deputy High Commissioner for Human Rights Flavia Pansieri in Guatemala May 22, 2014. In this regard Ms. Pansieri said: "I was also informed of cases where there seems to be a pattern of criminal proceedings at the local prosecutors , in the context of defending human rights linked to the exploitation of natural resources. Disproportionate offences are used in the allegations, such as conspiracy, terrorism or kidnapping, which correspond to the logic of a war against organized crime and not to social movement demands." Reply by Convergence for Human Rights of Guatemala to the questionnaire for the preparation of report on criminalization of human rights defenders of human rights through the misuse of criminal law, September 2014.

51. Response of the Latin American Union of Women to the questionnaire for the preparation of the report on criminalization of human rights defenders through the misuse of criminal law, September 2014. In this regard the Union indicates that in Peru, the criminalization has been used as a weapon to stop the opposition from the mining industry, mainly transnational large-scale mining projects.

52. IACHR, Second Report on the Situation of Human Rights Defenders in the Americas, OAS/Ser.L/V/II.Doc. 66, December 31, 2011, para. 94.

53. Global Justice response to the questionnaire for the preparation of report on criminalization of human rights defenders through the misuse of the criminal law, August 2014.

54. Carlos Martin Beristain, El derecho a la reparación en los conflictos socio ambientales. Experiencias, aprendizajes y desafíos prácticos (Spanish only), 2010, p. 27.

55. Response from the Mexican Center for Environmental Law AC (CEMDA) to the questionnaire for the preparation of the report on criminalization of defenders of human rights through the misuse of criminal law, September 2014. In this regard, CEMDA argues that many indigenous authorities and leaders who oppose these projects interfere with economic interests and threaten the profits of companies and the government. In these cases, when faced with a public policy or a development project, a sector of the population emerges which opposes its execution, or simply denounces the situation because they were not informed or consulted (...). This group can organize to present complaints and mobilize, and the government can respond with a series of measures to dismantle the movement, including accusations, acts of repression, or the cancellation of government support, among other measures.

56. UN Commission on Human Rights, E/CN.4/2004/80, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, January 26, 2004, p. 14.



laws, such as laws against terrorism and the prosecution of demonstrators for common crimes.<sup>57</sup> These prosecutions are allegedly motivated by the protection of interests of private actors and local power authorities.<sup>58</sup> For instance, according to the information received:

The Commission learned of the criminal prosecution of Darwin Javier Ramírez Piedra, a defender of land rights and President of the Junín community, in Ecuador. As part of his work and on behalf of the community, he has opposed a joint development project between the Ecuadorian national mining company (ENAMI) and the Chilean State mining company, Codelco, as this project involves indigenous territory, among other reasons. On April 10, 2014, Javier Ramírez was arrested by the National Police without a judicial order or warrant, when he and other community leaders were returning from an attempt to attend a meeting organized by the Interior Ministry in Quito on issues relating to land rights. He was first charged with assault on a public servant (“lesiones a funcionario público”) and later with terrorism, sabotage, and rebellion, for an alleged attack against a delegation of ENAMI that took place in April 2014. Although Javier Ramírez denied participating in the attack, and several witnesses confirmed that he was not at the scene, he was placed into pre-trial detention and remained there for 10 months. On September 15, 2014, a judge found that there was sufficient evidence to determine his guilt, on a charge of attacking and resisting authority (“ataque y resistencia”), and he was sentenced to 10 months in prison, a sentence that was already completed by his pre-trial detention.<sup>59</sup>

51. Additionally, the Commission has noted that this phenomenon is also present in the context of the promotion and defense of labor rights or social and economic rights, which is evident in the case of union leaders who are criminalized in retaliation for their participation in strikes against the breach of collective

<sup>57</sup> *Ibidem*.

<sup>58</sup> UN Commission on Human Rights, E/CN.4/2004/80, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, January 26, 2004, p. 17.

<sup>59</sup> Observatorio para la Protección de los Defensores de Derechos Humanos, et. al, *Criminalización de Defensores de Derechos Humanos en el Contexto de Proyectos Industriales: Un Fenómeno regional en América Latina* (Spanish only), October 2015, p. 9-10. *See also*, Susana Borrás, *El derecho a defender el medio ambiente: la protección de los defensores y defensoras ambientales* (Spanish only), Journal of the Faculty of Law PUCP, p.315; Decision of the Constituent Assembly of Ecuador, March 2008 (Spanish only), which states that “the criminalization of human rights defenders has taken place in the context of intervention mining, petroleum, by hydroelectric projects, to defend communal land collective rights and public spaces, to defend the water and environmental quality and logging.” Constituent Assembly of Ecuador, Order of March 14, 2008.

agreements, or for their demands for better working conditions and economic, social, and cultural rights.<sup>60</sup> Among the examples:

During its 150th Period of Sessions, the IACHR held a hearing on the situation of human rights and labor conflicts in Venezuela<sup>61</sup> in which it received information regarding the criminalization of labor protests and the opening of judicial proceedings against union members for strikes against the lack of compliance with collective agreements. At the hearing, the general coordinator of the Venezuelan Observatory of Social Conflict (OVCS) explained that 37% of the conflicts that have taken place in Venezuela in the last five years are due to labor issues resulting from the lack of compliance with collective agreements or demands to reform labor laws, especially in the public sector. However, he added that the State's response has been the criminalization of protest and the opening of court proceedings against trade unionists who have even been prosecuted in military courts.<sup>62</sup> In this regard, the Committee of Experts on the Application of Conventions and Recommendations of the International Labor Organization, in its observation published in 2012 and adopted at its 102nd session, expressed concern about the criminalization of legitimate trade union activities in Venezuela, in the context of its supervision of the implementation of the Convention on Freedom of Association and Protection of the Right to Organize.<sup>63</sup>

52. Additionally, the Commission has received information indicating that the defenders of women's rights that promote gender equality, and sexual and reproductive rights, are often targets of the problem of criminalization.<sup>64</sup> The wrongful application of criminal law serves to hinder and defame their causes, is often the result of the historical and structural inequality and discrimination faced by women,<sup>65</sup> and social norms and practices promote their repetition.<sup>66</sup> For instance:

<sup>60</sup> Response of the United Workers to the questionnaire for the preparation of the report on criminalization of human rights defenders through the misuse of criminal law, October 2014. They state that union leaders and women leaders have been criminalized in the context social and labor disputes after exercising their legitimate trade union activity.

<sup>61</sup> IACHR, 150 Period of Sessions, *Situation of human rights and labor disputes in Venezuela*, March 28, 2014.

<sup>62</sup> La Razon, *Criminalization of labor protests in Venezuela denounced before the IACHR* (Spanish only), March 29, 2014.

<sup>63</sup> Observation (CEACR) adopted in 2012, published in the 102 session of the ILO (2013).

<sup>64</sup> UN General Assembly, A/RES/68/181, Resolution of the General Assembly of the United Nations concerning the protection of women human rights defenders, adopted on December 18, 2013.

<sup>65</sup> The Human Rights Council of the United Nations has urged States not to discriminate against human rights defenders on any grounds, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and to desist, in this context, from any discriminatory measures against them, including intimidation, profiling, confiscation of assets, suspension of activities and exclusion from national consultative processes. UN General Assembly, A/HRC/RES/13/13, Resolution by the Human

In El Salvador, the Agrupación Ciudadana por la Despenalización del Aborto [Citizens for the Decriminalization of Abortion] and the Colectiva Feminista para el Desarrollo Local [Women's Collective for Local Development] requested on April 1, 2014 the implementation of the Special Law of Writs of Grace, so that pardons could be granted to 17 women who were accused of abortion, and sentenced to up to 40 years in prison. It was reported that following these actions, the women human rights defenders faced stigmatization, accusations, and harassment by press groups, among others, in El Salvador.<sup>67</sup> Additionally, it was alleged that some defenders have been threatened by officials of the executive branch of being accused of "incitement to the crime of abortion" should they continue their work in favor of women.<sup>68</sup>

53. The IACHR has also received information of cases of criminalization of defenders who promote the rights of lesbian, gay, bisexual, and transgender (LGBT) persons<sup>69</sup> In this sense, many English-speaking Commonwealth Caribbean countries still criminalize sexual relations between consenting adults of the same sex,<sup>70</sup> which negatively impacts the right of association of LGBT organizations that are seen as delinquent for promoting these rights.
54. Given these different scenarios in which the misuse of the criminal law is observed, a situation that is replicated to varying degrees in the countries of the region, the Commission recalls that it is the duty of States to publicly recognize that the exercise of the promotion and defense of human rights is a legitimate action and that, in exercising these actions, human rights defenders are not against State institutions but, to the contrary, aim to strengthen the rule of law and the extension of rights and guarantees to all people. All State authorities and officials must be aware of the principles regarding the activities of human rights defenders

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Rights Council, 13/13 Protection of human rights defenders, April 15, 2010, p. 2. In turn, according to the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women "Convention of Belém do Pará", in its preamble, violence against women is "a manifestation of the historically unequal power relations between women and men."

<sup>66</sup> UN General Assembly, A/RES/68/181, Resolution of the General Assembly of the United Nations concerning the protection of women human rights defenders, adopted on December 18, 2013.

<sup>67</sup> CAWN, Newsletter Autumn 2014, El Salvador – Ongoing smear campaign and threats targeting human rights defenders campaigning for sexual and reproductive rights, p. 4.

<sup>68</sup> Amnesty International, Defending Human Rights in the Americas: Necessary, Legitimate and Dangerous, 2014, p. 21; Documentation of the Mesoamerican Initiative for Human Rights Defenders (IM-Defensoras) received during the IACHR's 154th Period of Sessions in a hearing on "Abuse of Criminal Law for the Criminalization of Human Rights Defenders". October 31, 2014.

<sup>69</sup> See IACHR, Violence against LGBTI Persons (in Spanish only), OAS/Ser.L/V/II.rev.1 Doc. 36. November 12, 2015; OACNUDH in Mexico, Defending Human Rights: between commitment and risk (Spanish only). Report on the situation of the defenders of human rights in Mexico, p.11.

<sup>70</sup> Although many of these laws are construed broadly enough that they could be applied to sexual conduct between persons of different sexes, they have been disproportionately applied against persons of the same sex.

and their protection, as well as the applicable guidelines for the observance of those principles.<sup>71</sup>

## ***B. Actors Involved in the Misuse of Criminal Law***

55. The Commission has noted that, in the processes of manipulating the punitive power in order to criminalize the work of human rights defenders, the following State actors are usually involved: legislators, judges, prosecutors, ministers, police, and military officers, as well as non-State actors such as national and transnational private companies, private security guards, personnel working in mega-projects, and landowners.
56. In the contexts described above, the Commission has observed that defenders are often criminalized for the activities they carry out in the defense of human rights and are subject to criminal proceedings that are initiated against them following complaints that come from both State officials as well as private individuals. In said criminal complaints, they are often accused of crimes defined in a broad or ambiguous manner, contrary to the principle of legality or based on offenses that are contrary to the American Convention and other international commitments assumed by the States for the protection of human rights.
57. While lawmakers generally are not directly involved in the processes of criminalization, the formulation of offenses contrary to the rule of law contributes to the criminalization. An example of this is the enactment of laws that unduly punish the right to freedom of assembly and expression such as the criminal offenses that sanction the conduction of demonstrations without prior permission, and the laws that define the criminal offense in a very vague or ambiguous manner, such as some of the laws to combat terrorism. For this reason, lawmakers must observe the strict requirements characteristic to the defining of criminal offenses in order to satisfy the principle of legality and thus ensure that they are formulated explicitly, precisely, and previously and thus provide legal certainty to the citizen.<sup>72</sup>
58. In turn, the involvement of prosecutors in criminalization processes has been reported, indicating that they initiate investigations on their own initiative or based on complaints filed by individuals aimed at reducing the activities of human rights defenders. In this regard, the IACHR has noted that a frequent obstacle to complaints against human rights defenders “is that the authorities in charge of investigating the crime—perhaps due to a lack of precision in the criminal codes themselves, or due to a lack of diligence in the investigation—proceed with the

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<sup>71</sup> IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas*, OAS/Ser.L/V/II.Doc. 66, December 31, 2011. Recommendation No. 4.

<sup>72</sup> I/A Court H.R., *Case Kimel v. Argentina*. Merits, Reparations and Costs. Judgment of May 2, 2008 Series C No. 177, para. 63.

criminal indictment before gathering the necessary evidence to verify that the unlawful conduct has occurred.”<sup>73</sup>

59. The IACHR has also learned that prosecutors and other authorities sometimes perform secret preliminary investigations, which may include intelligence activities or collecting intelligence reports by the army or police, prior to, as part of, or even in the absence of a criminal investigation against a human rights defender. A clear example of this would be the intelligence operation carried out in 2005 following a visit by the IACHR to Valledupar by officers of the Administrative Security Department (DAS) of Colombia. Said operation was allegedly aimed at "identifying the cases being studied by the Rapporteur [for Colombia, Susana Villarán] and the testimonies presented by nongovernmental organizations, as well as the lobbying these organizations are doing to pressure for a condemnation of the State.”<sup>74</sup>
60. The Commission has also received information of other examples of information collection efforts for intelligence purposes targeting defenders, as the following:

The Court issued a judgment in 2009 pertaining to *Escher et al V. Brazil*, related to the interception and monitoring by the Military Police of the State of Parana of the telephone lines of members from Cooperativa Agrícola de Conciliação Avante Ltda. (COANA) and the Associação Comunitária de Trabalhadores Rurais (ADECON), social organizations associated with the Movimento dos Trabalhadores Rurais Sem Terra (MST). This case also reviewed the subsequent disclosure of these communications without a warrant and in a

<sup>73</sup> IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas*, OAS/Ser.L/V/II.Doc. 66, December 31, 2011. para 94.

<sup>74</sup> IACHR, Press Release 59/09, [IACHR expresses concern over intelligence operations related to Inter-American commission activities in Colombia](#), Washington, DC, August 13, 2009. See also, IACHR, Press Release 09/09, [IACHR concerns regarding intelligence activities in Colombia](#), Washington, DC, February 26, 2009.

manner contrary to existing laws, and its negative impact on the work and image of the affected organizations.<sup>75</sup> The divulged conversations were mostly related to the activities of the human rights movement promoting agrarian reform. For example, one of the witnesses stated that "everyone began to see [them] as criminals, as terrorists"; that the projects being implemented within the cooperative to assist production "were frozen for five years, until [...] it was possible to regain the trust [...] of the companies, the banks, and the government agencies, [so they] suffered immense moral and financial prejudice"; that "the civil and military police systematically harassed [the members of the associations]," and that, following the facts, he "avoided saying that [...] he was a member of COANA." In this regard, the Inter-American Court noted that the statements of witnesses "are consistent in revealing that when they found out about the interception and dissemination of their telephone conversations, they were extremely fearful and, also, that the dissemination caused problems for the members and the farmers linked to COANA and ADECON, in addition to affected the image of these associations [...]." The Inter-American Court also considered that the monitoring of the telephone communications—without respecting the legal requirements—caused fear and tensions and affected the image and credibility of the organizations, altering the free and normal exercise of the right to freedom of association of the abovementioned associations.<sup>76</sup>

61. In turn, the Commission has been informed that there are cases in which prosecutors obtain false statements from witnesses receiving State benefits,<sup>77</sup> as

<sup>75</sup> I/A Court H.R., *Case of Escher et al v. Brazil*. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 6, 2009. Series C No. 200, para. 179: "Arlei José Escher stated that "the dissemination denigrated him and the association of which he was a member. It even created conflicts and doubts within [COANA] and ADECON" and also "greatly affected [their activities,] which were paralyzed, and their projects were interrupted." He stated that he "was afraid that the harassment would start up again because he had testified."161 Delfino José Becker testified that he "did not know whether the activities of ADECON and COANA were affected or not by the dissemination; however, it affected their reputation."162 Furthermore, in his testimony, Pedro Alves Cabral stated "that owing to the dissemination, [his] personal and professional life was affected significantly and he had even been harassed by the police, [and that he was] imprisoned after the facts, but was not convicted. The dissemination made the farmers who were members of the cooperative afraid" and "the activities of ADECON and COANA were affected at the time, due to fear and apprehension."163 Similarly, Marli Bambrilla Kappaum testified that "she was afraid to testify, because [owing to the facts of the case] she distrusted the State," and that the dissemination "gave the impression that [the associations] were [...] organizations created to perpetrate crimes."164 Lastly, Celso Aghinoni testified before the Court that the image of the associations was prejudiced, that "everyone began to see [them] as criminals, as terrorists"; that the projects being implemented within the cooperative to assist production "were frozen for five years, until [...] it was possible to regain the trust [...] of the companies, the banks, and the government agencies, [so they] suffered immense moral and financial prejudice"; that "the civil and military police systematically harassed [the members of the associations]," and that, following the facts, he "avoided saying that [...] he was a member of COANA."

<sup>76</sup> I/A Court H.R., *Case of Escher et al v. Brazil*. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 6, 2009. Series C No. 200, para. 180.

<sup>77</sup> Human Rights First, *Foro Internacional sobre Criminalización en Contra de Defensores de Derechos Humanos en Guatemala* (Spanish only), November 11, 2009, p.3; In Colombia, it would have denounced cases of

well as omit to individualize the participation in the facts of each defendant in establishing the circumstances of means, time, and place.<sup>78</sup> In some cases, this has permitted the prosecution of people who were not at the scene or even within the country when the alleged crime occurred. As reported, for example:

In Colombia, Carolina Rubio Esguerra, head of the Santander Section of the Fundación Comité de Solidaridad con los Presos Políticos (FCSP) [Foundation Committee of Solidarity with Political Prisoners] and facilitator of Norte de Santander chapter of the National Movements of Victims of State Crimes (MOVICE) who acts as a delegate to the Operating Committee of the Colombia-Europe-United States Coordination Group, was arrested on November 16, 2010 and charged for the crime of rebellion. The investigation against her was launched after the statements made by two demobilized guerrillas of the FARC, who indicated that Rubio Esguerra had allegedly belonged to Front 24 of the guerrilla group, between 2002 and 2005. On November 23 2010, the UN Special Rapporteur on the situation of human rights defenders, together with the Chairman-Rapporteur of the Working Group on Arbitrary Detention, sent an urgent appeal expressing concern at allegations that her arrest and the charges against her could be related to her peaceful and legitimate activities of promotion and protection of human rights.<sup>79</sup> Finally, on July 27, 2011 the Prosecutor 87 of the National Human Rights Unit determined that there was insufficient evidence to begin a trial because the charges were based on the testimony of two witnesses of little credibility.<sup>80</sup>

62. The Commission considers that the State must ensure that the authorities responsible for the investigation of crimes collect the necessary evidence to determine the existence of unlawful conduct before proceeding with charges.<sup>81</sup> In this regard, the Inter-American Court has stated that prosecutors must see to it that the law is correctly applied and seek the truth of the events that occurred, acting professionally, loyally and in good faith, considering both elements that prove the existence of the crime and the participation of the person charged with

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demobilized combatants who have given false testimony against defenders in exchange for money or legal benefits. See Coordinadora Andina de Organizaciones Indígenas, *Prisoner for defending Mother Earth? Criminalization of the Exercise of Rights of the Indigenous Peoples*, 2008, p. 15.

<sup>78</sup> UDEFEGUA, *Repudiamos la profundización de la criminalización en La Puya* (Spanish only), May 27, 2014.

<sup>79</sup> UN General Assembly, Human Rights Council, A/HRC/16/44/Add.1 *Report of the Special Rapporteur on the situation of human rights defenders*, Margaret Sekaggya, February 28, 2011.

<sup>80</sup> Peace Brigades International response to the questionnaire for the preparation of the report on criminalization of human rights defenders through the misuse of criminal law, September 2014. See Carolina Rubio, *Fundación Comité de Solidaridad con los Presos Políticos* (Spanish only).

<sup>81</sup> IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas*, OAS/Ser.L/V/II.Doc. 66, December 31, 2011, para. 94.



such crime, as well as the elements that may extinguish or extenuate the criminal responsibility of the accused.<sup>82</sup>

63. For their part, judges also participate in criminalizing defenders when they accept processes without evidence or with claims from false witnesses, accelerate processes with the goal to repress the accused defender,<sup>83</sup> issue arrest warrants against defenders without sufficient basis,<sup>84</sup> do not respect the guarantee of reasonable time and subject defenders to lengthy proceedings, and issue resolutions contrary to domestic legislation. Likewise, judges contribute to the processes of criminalization when they improperly interpret the law and fail to take into account international instruments that protect human rights defenders, actions which result in the obstruction of the latter's work.<sup>85</sup>
64. The Commission reiterates that the States must ensure the observance of due process in criminal cases against human rights defenders in order to avoid the use of unreliable evidence, unwarranted investigations and procedural delays, thereby effectively contributing to the expeditious closing of all unsubstantiated matters, with individuals being afforded the opportunity to file complaints directly with the appropriate authority.<sup>86</sup>
65. Also, as in any criminal proceeding, clear proof of the guilt of the defender is a prerequisite for the criminal sanction, and the burden of proof should lie with the accusing party and not the accused. The lack of evidence proving responsibility beyond a reasonable doubt for a guilty verdict is a violation of the principle of presumption of innocence, which is essential for the effective realization of the right to defense and accompanies the accused throughout the trial proceedings until a final judgment is issued which determines responsibility.<sup>87</sup>
66. The IACHR has also learned that on occasion judges, by having dismissed criminal proceedings against defenders for lack of evidence, were disciplined or dismissed from their respective posts.<sup>88</sup> This situation usually is preceded by statements or

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<sup>82</sup> I/A Court H.R., *Case of Tristán Donoso v. Panama*. Preliminary Objection, Merits, Reparations and Costs. Judgment of January 27, 2009. Series C No. 193, para. 165.

<sup>83</sup> UDEFEGUA Guatemala, Guide For Human Right Defenders Against Criminalization (Spanish only), 2009, p.5.

<sup>84</sup> PBI, Informe de la misión de corto plazo en Honduras: La situación de los defensores y las defensoras de derechos humanos (Spanish only), 2011, p.14.

<sup>85</sup> INREDH, Criminalización de los Defensores y Defensoras de Derechos Humanos en Ecuador, (Spanish only) 2011, p. 145.

<sup>86</sup> UN Human Rights Council, A/HRC/22/L.13, Protecting human rights defenders, Recommendation 11 c).

<sup>87</sup> I/A Court H.R., *Case López Mendoza v. Venezuela*. Merits, Reparations and Costs. Judgment of September 1, 2011. Series C No. 233, para. 128.

<sup>88</sup> IACHR, Democracy and Human Rights in Venezuela, OAS/Ser.L/V/ II.Doc.54, December 30, 2009, para. 287. IACHR, 154 Period of Sessions, Situation of the Right to Freedom of Association and Assembly in Peru, on March 17, 2015. At that hearing, the petitioners stated that "another problem is the administrative harassment linked to fiscal and judicial against the judicial officials who defend the rights of citizens for protesting legitimately or issue resolutions against impunity for criminal acts committed by the force of order; harassment resulting in degradation of provisional judges and prosecutors, the start of disciplinary investigations or transfer of their duties as judges, [a judge who] declares a habeas corpus justified, finding that there was indeed arbitrary detention, leaves office or is moved from its place where he performs his duties (...)."



speeches by public officials such as ministers, governors, mayors, and representatives of public institutions, who publicly incriminate defenders, pushing justice officials fearing reprisals to admit baseless or illegally promoted criminal accusations.

67. The police and military officials are also active participants in the processes of criminalization. Both actors, in certain situations, conduct research, present unjustified complaints against defenders, participate as witnesses in illegitimate allegations that companies present against human rights defenders,<sup>89</sup> and often carry out the arrest of defenders using excessive force. In the context of opposition to mega-projects, especially those involving the extraction or exploitation of natural resources, military intervention is mostly evidenced. For example, "in some countries, governments utilize military forces to protect oil or gas facilities, viewed as being strategic resources."<sup>90</sup>
68. Regarding the intervention of business owners, as the IACHR documented in its 2011 Report, "Often, the owners who manage these megaprojects or the staff who work on them are the ones lodging criminal complaints against defenders for the purpose of reducing their activities of defense of their rights."<sup>91</sup> It has been reported that private companies not only file complaints within unfounded criminal prosecutions, but sometimes conduct smear campaigns against human rights defenders in order to affect their credibility, and materialize alliances with military and police officers to obtain the arrests of human rights defenders.<sup>92</sup>
69. In this regard, the UN Special Rapporteur on the situation of human rights defenders, Margaret Sekagya, drew attention to the fact that in several cases of which she had been informed, certain private companies aided and instigated the violation of human rights defenders' rights. In particular she noted that "some corporations have allegedly been impeding the activities of defenders working, inter alia, on labour rights, the exploitation of natural resources, the rights of indigenous peoples and minorities."<sup>93</sup> She noted that in several cases private companies had provided false information to the State causing the processing and sentencing of several human rights defenders.<sup>94</sup> She also noted that "the media is also involved in violations committed against human rights defenders."<sup>95</sup>
70. The Commission has also learned of the presentation of unjustified allegations by private companies against defenders, although the latter were not in the place of

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<sup>89</sup> *Ibidem.*

<sup>90</sup> INREDH, *Criminalización de los Defensores y Defensoras de Derechos Humanos en Ecuador*, (Spanish only) 2011, p. 145.

<sup>91</sup> IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas*, OAS/Ser.L/V/II.Doc. 66, December 31, 2011. Para. 94.

<sup>92</sup> INREDH, *Criminalización de los Defensores y Defensoras de Derechos Humanos en Ecuador*, (Spanish only) 2011, p. 90.

<sup>93</sup> UN General Assembly, *Report of the Special Rapporteur on the situation of human rights defenders*, A/65/223, August 4, 2010, para. 9.

<sup>94</sup> *Ibid.*, para.11.

<sup>95</sup> *Ibid.*, para.17.

the alleged acts and sometimes not even in the country. Moreover, the IACHR is aware of criminalization processes in which private security guards are involved, who file unsubstantiated allegations, or make illegal arrests under the pretext of acting with State's authorization,<sup>96</sup> as well as landowners and isolated individuals who sometimes collude with government agents or companies.<sup>97</sup> For instance:

In Guatemala, eight water source defenders located in the Montaña de las Granadillas, Zacapa were accused of illegal detentions, threats and disorderly conduct for events which occurred on September 26, 2010 in the village La Trementina, Zacapa. In the events at issue, about a hundred people, in the presence of guards from the Division of Nature Protection and the National Civil Police, forced many farmers to place a couple of pine poles that they removed and that prevented the passage of trucks loaded with timber from Montaña Las Granadillas, which was the main source of water replenishment of several communities in the departments of Zacapa and Chiquimula. For this reason, the farmers brought criminal proceedings against them. However, at the first hearing, it was proven that one of the accused, Reverend José Pilar Alvarez, was out of the country at the time of the events; another, Jesús Ruben Aldana, was at a community meeting 10 kilometers away from the scene; Sergio Menéndez, also linked to the process, was at his workplace; and Glenda Anton, was also not at the scene.<sup>98</sup> The judge dismissed that case and indicated that "to link to the criminal proceedings in this case is merely a risky situation because the prosecution did not individualize the participation of each of the accused, did not perform site inspections, failed to elaborate on testimonial evidence, nor verified the authenticity of the photographs presented as evidence." He also said that participating in a church or association as a defender of nature is no cause for offense.<sup>99</sup>

71. Although the State has an obligation to promote and pursue criminal proceedings as well as the duty to investigate complaints that are brought to its attention by non-State actors, justice operators must also be careful not to begin unfounded prosecutions against defenders on the sole basis of carrying out their work legitimately.

<sup>96</sup> Robert F. Kennedy Center for Justice & Human Rights. Tilted Scales: Social Conflict and Criminal Justice in Guatemala, p. 9.

<sup>97</sup> UN General Assembly, Report of the Special Rapporteur on the situation of human rights defenders, A/65/223, August 4, 2010, para. 14.

<sup>98</sup> FIDH, Intervenciones Urgentes emitidas por el Observatorio en 2008 y 2009 relativas a Guatemala (Spanish only), in March 2010, page 14.

<sup>99</sup> FIDH, "Concluye favorablemente proceso judicial contra ocho defensores de medio ambiente," (Spanish only) April 15, 2011; PIDAASSA.org, Juez absuelve a sacerdote luterano y 7 campesinos acusados de detención ilegal y amenazas. (Spanish only).

72. The Commission recalls that OAS Member States, in compliance with their duty to guarantee the human rights at stake in citizen security policies, must assume the functions of prevention, deterrence, and suppression of crime and violence, as they are the custodians of the monopoly of legitimate force. States must protect defenders against human rights violations committed by non-State actors given that the State can be internationally responsible "for attribution to it of acts that violation human rights committed by third parties or individuals, within the framework of the obligations of the State to guarantee respect for those rights between individuals."<sup>100</sup>
73. Additionally, when justice operators are confronted with accusations and criminal charges that are clearly unfounded, they are obligated to investigate the source(s) of these arbitrary complaints or vexatious litigation and impose an appropriate sanction. Doing so will also serve to discourage future abuse of the judicial process and waste of judicial resources. The Commission also recalls that the State obligation to investigate conduct affecting the rights protected by the American Convention on Human Rights (hereinafter "American Convention" or "ACHR") and the American Declaration on the Rights and Duties of Man (hereinafter "American Declaration") applies irrespective of the agent to whom the violation may be attributed. In the event that the conduct in question is attributable to non-State individuals, when not followed by a serious investigation it could compromise the international responsibility of the State as a helping party.<sup>101</sup> In cases where the conduct in question may involve the participation of State agents, States have a special obligation to clarify the facts and prosecute those responsible.<sup>102</sup>

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<sup>100</sup> I/A Court H.R., *Case Castillo Gonzalez v. Venezuela*. Background. Judgment of November 27, 2012. Series C No. 255, para. 111. (Spanish only)

<sup>101</sup> I/A Court H.R., *Gonzalez and others ("Cotton Field") v. Mexico*. Judgment of November 16, 2009. Series C No. 205, para. 291; *Massacre case of Pueblo Bello v. Colombia*. Judgment of January 2006, Series C No. 140, para. 31. 145; *Kawas Fernández v. Honduras*. Merits, Reparations and Costs, Judgment of April 3, 2009, Series C No. 196, para. 78.

<sup>102</sup> I/A Court H.R., *Case of the Massacre of Pueblo Bello v. Colombia*. Judgment of January 31, 2006, Series C No. 140, para. 143; *Case of Heliodoro Portugal v. Panama*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 12, 2008, Series C No. 186, para. 144; and *Case of Valle Jaramillo et al v. Colombia*. Merits, Reparations and Costs, Judgment of November 27, 2008, Series C No. 192, para. 101.

CHAPTER 3  
MAIN FORMS OF  
CRIMINALIZATION OF THE  
WORK OF HUMAN RIGHTS  
DEFENDERS



## MAIN FORMS OF CRIMINALIZATION OF THE WORK OF HUMAN RIGHTS DEFENDERS

74. Criminal law is the most restrictive and severe mean to establish responsibilities regarding illegal conduct.<sup>103</sup> This is why democratic societies should reserve the use of this State tool to sanction the most harmful behaviors, taking into account the principle of strict legality of the prohibition, as well as the proportionality of the sentence.<sup>104</sup> The Commission has noted, however, that in several countries of the region the punitive power has been used not to prevent and punish the commission of crimes or violations of the law, but in order to criminalize the legitimate work of human rights defenders. The misuse of criminal law occurs for example when defenders are wrongfully accused of committing crimes as a result of their activities, depriving them of freedom in crucial moments for the defense of their causes, as well as processing them without due process guarantees.
75. The Commission has indicated that the criminalization of human rights defenders is a phenomenon of a complex nature that can be perpetrated in various ways. As indicated in previous sections, through its monitoring mechanisms, the IACHR has identified that sometimes the misuse of criminal law is preceded by statements or remarks in which public officials accuse human rights defenders of committing crimes without the existence of ongoing processes or judicial decisions that have so determined. Such statements can motivate the opening of baseless prosecutions against defenders, for the sole fact of being signaled by a high official or State authority.
76. The IACHR has also remarked that, in most cases, the criminalization of human rights defenders consists of the formulation and application of criminal offenses to behaviors and persons, respectively transforming them into crimes and criminals, which directly or indirectly criminalizes, or makes illegal, the defense of human rights. These criminal offenses vary from those that *per se* conflict with inter-American instruments and jurisprudence, and therefore should be struck down,<sup>105</sup> as well as those that are contrary to the principle of legality, as their wording is ambiguous or vague, the modalities of participation in the crime are unclear, and

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<sup>103</sup> I/A Court H.R., *Case of Ricardo Canese v. Paraguay*. Merits, Reparations and Costs. Judgment of August 31, 2004. Series C No. 111, para. 104; *Case Palamara Iribarne v. Chile*. Merits, Reparations and Costs. Judgment of November 22, 2005. Series C No. 135, para. 79; *Case Kimel v. Argentina*. Merits, Reparations and Costs. Judgment of May 2, 2008 Series C No. 177, para. 76.

<sup>104</sup> The Commission reiterates that the criminal justice system is the most severe means that the state has at its disposal to determine liability and, therefore, it must be used in strict adherence to fundamental principles such as due process. IACHR, *Report on the Situation of Defenders of Human Rights in the Americas*, OAS/Ser.L/V/II.124, Doc. 5 Rev. 1, March 7, 2006, para. 116.

<sup>105</sup> I/A Court H.R., *Case Castillo Petruzzi v. Peru*. Judgment of May 30, 1999. Series C, No. 52, para. 207.

sometimes the intent that is required for that behavior to become unlawful is not specified, preventing adequate knowledge of the behavior that is punishable.

77. Additionally, the misuse of criminal law also occurs when defenders are subject to lengthy legal proceedings contrary to the guarantees of due process, with the aim to repress or intimidate their activities of promotion and defense of human rights. The Commission has also observed that the manipulation of the punitive power occurs when courts dictate precautionary measures without first attending to the procedural purposes of these measures, such as ensuring the appearance of the defendant at the trial, instead seeking to limit the work of the defender being prosecuted. There have also been reports of arbitrary detentions of defenders for the same purpose of restricting their work and discouraging them from continuing to promote their causes. The main forms of criminalization of human rights defenders are discussed below.

## ***A. Statements by Government Officials who Accuse Defenders of Crimes in the Absence of Court Decisions***

78. The Commission is aware of statements, assertions and communiqués issued by State authorities with the goal to incriminate human rights defenders in acts for which there is no ongoing proceeding or have not been judicially determined. At the same time, as the IACHR has learned, sometimes public officials have issued statements that stigmatize human rights defenders even though these have been acquitted in the context of criminal proceedings.<sup>106</sup>
79. These statements generally seek to delegitimize the work of human rights defenders, stigmatizing them before society. Additionally, the Commission has noted that such assertions and statements in some cases can serve as a basis for instituting criminal proceedings against human rights defenders in order to obstruct their work.
80. According to information received by the Commission, in some countries of the continent, public officials and State media describe human rights defenders as “terrorists”, “enemies of the State”, “political opponents”,<sup>107</sup> “criminals,” “conspirators,” “enemies of development,” “eco-terrorist,”<sup>108</sup> “counter-revolutionaries,” among other epithets.<sup>109</sup> Statements of this nature are not only intended

<sup>106</sup> IACHR, Report 43/96, Case 11.430, Jose Francisco Gallardo (Mexico), October 15, 1996, para. 76.

<sup>107</sup> UN, General Assembly, Human Rights Council, A/HRC/13/22, Report of Ms. Margaret Sekaggya, Special Rapporteur on the situation of human rights defenders, December 20, 2009, para. 27.

<sup>108</sup> IACHR, 143 Period of Sessions. Public Hearing on the “*Situation of Human Rights in Venezuela*”. Held at Headquarters on October 25, 2011.

<sup>109</sup> Human Rights Foundation response to the questionnaire for the preparation of the report on criminalization of human rights defenders through the misuse of criminal law, in September 2014. In this regard, it indicates that human rights defenders are also victims of disrepute campaigns through the official media, where they are commonly disqualified under the criminalizing labels “antisocial elements”, “mercenaries”, “subversive”, “terrorists” and “counterrevolutionaries.” Response of the Permanent Assembly for Human Rights Peace (APDH) questionnaire for the preparation of the report on criminalization of human rights defenders through

to delegitimize the work of human rights defenders, generating an adverse environment for the defense of human rights, but also constitute the prelude to the initiation of unfounded criminal accusations and judicial proceedings against them. Additionally, as reported, in some States the authorities call upon opening of criminal proceedings against defenders for speaking out against government policies. Among the examples reported:

The IACHR has received information indicating that human rights defenders in the Bahamas face a hostile environment that endangers their safety and work. In particular, it was reported that members of the Grand Bahama Human Rights Association (GBHRA) have been threatened for speaking out against recent changes in migration policies. The defenders also indicated that government officials, some of them of high level, made statements against the defenders, minimizing their work. For example, they noted that the Foreign Minister had threatened to initiate criminal proceedings for defamation and sedition against Fred Smith and Joe Darville, GBHRA directors, for their opinions against the new immigration policy.<sup>110</sup>

81. According to the information gathered, most of these accusations are directed to groups of defenders in a particular situation of vulnerability, such as women human rights defenders working on issues of gender and sexual and reproductive rights; defenders of the rights of LGBT persons; defenders working on social, economic, and cultural rights, particularly indigenous peoples as well as those working on land issues;<sup>111</sup> and those who denounce serious human rights violations involving State officials.<sup>112</sup>
82. For example, the Commission has received information that, in some States, senior officials have issued statements accusing human rights defenders and organizations of conspiring against the State, of foreign interference, of collusion with organized crime, financing of terrorist groups, among others.<sup>113</sup> Among the examples reported:

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the misuse of criminal law, September 2014. In this regard they indicate that defenders are accused of being terrorists, rebels, kidnappers, destabilizers, and traitors to their country.

<sup>110</sup> IACHR, 154 Period of Sessions, Human rights situation of migrants in Bahamas, held at IACHR Headquarters on March 20, 2015.

<sup>111</sup> UN, General Assembly, Human Rights Council, A/HRC/22/47/Add.1 Report of the Special Rapporteur on the situation of human rights defenders, Mission to Honduras, párr.113.

<sup>112</sup> *Ibidem*.

<sup>113</sup> FIDH, Annual Report 2013, Violations of the right of NGOs to funding: from harassment to criminalisation, 2013, p. 62.



The Commission received information on a number of statements made by high level Venezuelan authorities against members of various human rights organizations.<sup>114</sup> Thus, for example, information was received that the Minister of Interior, Justice and Peace Miguel Rodríguez Torres, at a press conference broadcasted on national radio and television on 2 May 2014, accused Humberto Prado, Director of the *Observatorio Venezolano de Prisiones*, Rocío San Miguel, Director of the organization *Control Ciudadano*, and Gonzalo Himiob and Tamara Suju, lawyers from the *Foro Penal Venezolano* as actors in an alleged insurrection and conspiracy plan against the government.<sup>115</sup> Also, on May 12, 2014, the President of the National Assembly, Diosdado Cabello, on the TV show “Con el mazo dando” from the State channel VTV, accused 14 people of conspiracy, noting that they would be placed at the disposal of the Venezuelan justice.<sup>116</sup> Among the accused are Alfredo Romero, Director of the Venezuelan Penal Forum. Moreover, the IACHR received information that during the program of November 6, 2014, the President of the National Assembly issued statements once again, this time against the organizations who attended the hearings before the United Nations Committee against Torture, among those listed were Humberto Prado and the General Coordinator of PROVEA, Marino Alvarado. It also reportedly said that the NGO Espacio Público “is one of 12 NGOs with vested interests that drive allegations of torture and cruelty against the Venezuelan government.” Then he referred to the Director of that NGO, Carlos Correa, as a “friend of fugitives from Venezuelan justice.”<sup>117</sup>

83. The IACHR has reiterated that “public officials must refrain from making statements that stigmatize human rights defenders or that suggest that human rights organizations act improperly or illegally, merely because of engaging in their work to promote and protect human rights.”<sup>118</sup> In this regard, it has recommended

<sup>114</sup> IPYS Venezuela report, “Los Mazasos” against the media and dissent, January 2015. For example, in this report, it indicates that in the broadcast of the program “Con el Mazo dando” that took place from October 3 to December 3, 2014, 165 people have been singled out, which would include 34 NGOs. In this regard, it is noted that these persons were accused of alleged crimes and wrongdoings. It is indicated that the persons mentioned in the program of the President of the National Assembly are often branded as “rightist”, “fascists”, “destabilizing”, and “conspirators.”

<sup>115</sup> PROVEA, *ONG, víctimas y organizaciones sociales, rechazaron la criminalización de los defensores de Derechos Humanos* (Spanish only), May 6, 2014; Venezuelan News Agency, *Ultra derecha venezolana ejecuta plan de sedición violenta con apoyo de Estados Unidos* (Spanish only), May 2, 2014.

<sup>116</sup> El Universal, *Diosdado Cabello señala a 14 venezolanos como conspiradores* (Spanish only), May 13, 2014; See also: Carabobeña News Agency, *Cabello acusa a 14 venezolanos de conspiradores* (Spanish only), May 13, 2014.

<sup>117</sup> PROVEA, *Diosdado Cabello hostiga a ONG Espacio Público* (Spanish only), November 7, 2014; *Diosdado Cabello hostiga a Coordinador General de Provea* (Spanish only), November 7, 2014.

<sup>118</sup> IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas*, OAS/Ser.L/V/II.Doc. 66, December 31, 2011. para 124.

that governments give precise instructions to its officials to refrain from making statements that stigmatize human rights defenders.<sup>119</sup>

84. The IACHR considers that the stigmatizing statements against defenders can violate the right to humane treatment, the right to honor and dignity, and the presumption of innocence. In this regard, the Commission has considered that when authorities make statements or issue communiqués in which they publicly incriminate a defender for acts that have not been judicially established, it undermines their dignity and honor since it discredits their work in the eyes of society,<sup>120</sup> thereby affecting their activities in defense of human rights. For instance:

Following the assassination of Senator Manuel Cepeda Vargas (of the Patriotic Union party, or UP in Spanish) in August 1994 in Colombia, then President Álvaro Uribe Vélez, in his re-election campaign in 2006, allegedly attacked the human rights work of Senator Iván Cepeda Castro, son of Manuel Cepeda Vargas.

85. Moreover, the Commission has indicated that the repetition of stigmatizing statements may contribute to exacerbate the climate of hostility, intolerance and rejection from different sectors of the population which could lead to an impairment to life and physical integrity of the human rights defender, increasing his or her vulnerability as public officials or sectors of the society could interpret them as instructions, instigations, or any form of authorization or support for the commission of acts that may put at risk or violate his or her right to life, personal safety, or other rights.<sup>121</sup> Particularly when these accusations are made in the context of an armed conflict, illegal groups might consider that acts of violence aimed at silencing human rights defenders have the acquiescence of governments.<sup>122</sup> For example,

According to a report by Human Rights First concerning Colombia, many defenders are systematically harassed by paramilitaries after an investigation is closed, or after being accused through public statements, sometimes forcing them to seek asylum in another country.<sup>123</sup> For example, Alfredo Correa de Andreis, a human rights activist and professor at the University of Magdalena, was arrested

<sup>119</sup> *Ibid.* Recommendation No. 5.

<sup>120</sup> IACHR, *Democracy and Human Rights in Venezuela*, para. 616. See also: IACHR, Report 43/96, Case 11.430, Merits, Jose Francisco Gallardo, Mexico, October 15, 1996, para. 76.

<sup>121</sup> I/A Court H.R., *Rios et al v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of January 28, 2009. Series C No. 194, para. 143.

<sup>122</sup> IACHR, *Report on the Situation of Human Rights Defenders in the Americas*, OAS/Ser.L/V/II.124 Doc. 5 Rev. 1, 2006 para. 170.

<sup>123</sup> Human Rights First, *Baseless Prosecutions of Human Rights Defenders in Colombia*, February 2009, p. 6.

on June 17, 2004 and accused by the Prosecutor 33 of Cartagena of rebellion and belonging to the FARC guerrilla group. He was subsequently released after a judge declared the case against him to be groundless. However, on September 17, 2004, shortly after his release, he was killed by presumed paramilitaries who apparently believed the prosecutor's assertion.<sup>124</sup>

86. The IACHR believes that stigmatizing statements issued by public officials publicly accusing human rights defenders of alleged crimes that have not been judicially declared can undermine the presumption of innocence, because it presupposes their guilt without a judicial decision on the matter.<sup>125</sup> In this regard, the Commission has considered that not only is the presumption of innocence violated when a person is pronounced guilty before the end of a trial, but it may also be tacitly violated when from the context of the actions a pattern of unmistakable harassment may be derived that prejudices the responsibility of the individual.<sup>126</sup>
87. For its part, the Inter-American Court has noted that States have a position as guarantors of the fundamental rights of individuals, and therefore the exercise of freedom of expression by public officials is subject to special duties, including the special duty to reasonably verify the facts on which their statements are based. This requires officials to verify in a reasonable matter, although not necessarily exhaustively, the truth of the facts on which their opinions are based.<sup>127</sup> This verification should be performed with a higher standard than the one used by private parties, given the high level of credibility enjoyed by the authorities, in order to prevent citizens from receiving a distorted version of the facts.<sup>128</sup>
88. Additionally, in regards to the State's obligations to respect, guarantee, and promote human rights, it is the duty of public officials to ensure that when they exercise their freedom of expression they do not overlook fundamental rights.<sup>129</sup> This includes ensuring that their expressions are not "forms of direct or indirect interference or harmful pressure on the rights of those who seek to contribute [to] public deliberation through the expression and [dissemination] of their thoughts."<sup>130</sup> This special duty of care is heightened particularly in situations involving social conflict, breaches of the peace, or social or political polarization precisely because of the risks such situations might pose for specific individuals or

<sup>124</sup> *Ibid.* p. 7.

<sup>125</sup> IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas*, OAS/Ser.L/V/II.Doc. 66, December 31, 2011. See Chapter IV. Recommendation No. 13.

<sup>126</sup> IACHR, Report No. 43/96, Case 11.430, Merits, Jose Francisco Gallardo, Mexico, October 15, 1996, para. 110.

<sup>127</sup> IACHR, *The Inter-American Legal Framework regarding the Right to Freedom of Expression*, OAS/Ser.L/V/II/CIDH/RELAY/INF.2/09, December 30, 2009, para. 202.

<sup>128</sup> I/A Court H.R., *Case of Apitz Barbera et al ("First Court Of Administrative Disputes") v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008. Series C No. 182, para. 131.

<sup>129</sup> IACHR, *The Inter-American Legal Framework regarding the Right to Freedom of Expression*, OAS/Ser.L/V/II/CIDH/RELAY/INF.2/09, December 30, 2009, para. 911.

<sup>130</sup> IACHR, *Annual Report of the Inter-American Commission on Human Rights 2013*, Volume II, *Annual Report Of The Office Of The Special Rapporteur For Freedom Of Expression*, OAS/Ser.L/V.II Doc.50, December 31, 2013, para. 911.

groups at a given time,<sup>131</sup> such as defenders who, in these contexts, exercise their right to speak critically or lodge complaints of alleged human rights violations.

89. In turn, the Inter-American Court has stated that "public officials, particularly the top Government authorities, need to be especially careful so that their public statements do not amount to a form of interference with or pressure impairing judicial independence and do not induce or invite other authorities to engage in activities that may abridge the independence or affect the judge's freedom of action,"<sup>132</sup> since this would affect the correlative rights to such independence to which citizens are entitled. It is particularly important to prevent judges and prosecutors from feeling pressured to initiate actions against human rights defenders due to having been pointed out by some high-level authority, despite the absence of sufficient evidence to incriminate them.
90. The IACHR considers that States must provide defenders with an appropriate remedy when they are subjected to stigmatizing statements that can affect their reputation, jeopardize their personal integrity, and lend to or facilitate their criminalization. In this regard, Article 14 of the American Convention states that "anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communications outlet, under such conditions as the law may establish." Therefore, in the IACHR's view, when officials make stigmatizing statements against defenders, the path of correction or reply must be opened to defenders, without prejudice to the appropriate disciplinary measures that may also be taken.<sup>133</sup>
91. It is also essential that States recognize publicly and unequivocally the importance of the role played by human rights defenders to guarantee democracy and the rule of law in society, and that the States' commitment be reflected in all levels of government, whether at the municipal, state or national level and in all areas of power - executive, legislative or judicial - as well as through education and outreach activities aimed at all State agents, society in general, and the media to raise awareness about the importance and legitimacy of the work of human rights defenders and their organizations.<sup>134</sup>
92. Public officials, especially those in the highest positions of the State, have the duty to respect the circulation of information and opinions, even when these are contrary to their interests and positions. In this sense, they should actively promote pluralism and tolerance, inherent in a democratic society. This derives from the obligation to protect the human rights of all people and in particular those in situations of extraordinary risk, as is the case of human rights defenders

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<sup>131</sup> *Ibid*, para. 870.

<sup>132</sup> I/A Court H.R., *Case of Apitz Barbera et al ("First Court Of Administrative Disputes") v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008. Series C No. 182, para. 131.

<sup>133</sup> *Ibid*. Recommendation No. 5.

<sup>134</sup> I/A Court H.R., *Case of Apitz Barbera et al ("First Court Of Administrative Disputes") v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008. Series C No. 182, Recommendation No. 6.

who have been threatened or have protective measures, whether national or international.

## ***B. The Criminalization of Speeches Denouncing Human Rights Violations and the Right to Peaceful Social Protest***

93. In several countries in the region, human rights defenders have faced criminal prosecution for exercising their right of free expression after making complaints alleging human rights violations or for exercising their right to peaceful social protest. Such actions are based on the alleged affectation to the honor or reputation of public servants, and the protection of the right to movement or maintaining public order in the context of the exercise of social protest.
94. Freedom of thought and expression is protected by Articles IV of the American Declaration and 13 of the American Convention, and while it is not an absolute right, its restrictions have an exceptional character and in no way may limit, beyond what is strictly necessary, its full exercise.<sup>135</sup> According to the rules established by the American Convention, for all restrictions on freedom of expression to be legitimate, they must meet a strict tripartite test, which requires that sanctions: (1) be defined in a precise and clear manner by a preexisting law, in the formal and material sense; (2) be oriented to achieving objectives authorized by the American Convention; and (3) be necessary in a democratic society to achieve the objective sought; proportionate to the aim pursued; and appropriate to serve said objective.<sup>136</sup> These conditions must be verified simultaneously, and it corresponds to the authority that imposes them to show that all of them have been fulfilled.
95. This test is applied with a special intensity when prohibitions are established through criminal law.<sup>137</sup> The IACHR and the Inter-American Court have consistently held that the necessity test of the limitations should be applied more strictly when dealing with expressions referring to the State, public interest affairs, public officials in the exercise of their functions or candidates running for public

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<sup>135</sup> I/A Court H.R., *Case Kimel v. Argentina*. Merits, Reparations and Costs. Judgment of May 2, 2008 Series C No. 177, para. 54.

<sup>136</sup> IACHR, *Annual Report of the Special Rapporteur for Freedom of Expression 2009*, Chapter III Inter-American Legal Framework of the Right to Freedom of Expression, December 2009, para. 68.

<sup>137</sup> I/A Court H.R., *Case Ivcher Bronstein v. Peru*. Merits, Reparations and Costs. Judgment of February 6, 2001. Series C No. 74; *Case of Herrera Ulloa v. Costa Rica*. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107; *Case of Ricardo Canese v Paraguay*. Merits, Reparations and Costs. Judgment of August 31, 2004. Series C No. 111 31; *Case Palamara Iribarne v. Chile*. Merits, Reparations and Costs. Judgment of November 22, 2005. Series C No. 135; *Case Kimel v. Argentina*. Merits, Reparations and Costs. Judgment of May 2, 2008 Series C No. 177; IACHR, *1994 Annual Report*, Chapter V: Report On The Compatibility Of "Desacato" Laws With The American Convention On Human Rights. OAS/Ser.L/V/II.88. doc. 9 rev. February 17, 1995.

office, or private individuals voluntarily involved in public affairs, as well as political discourse and discussions.<sup>138</sup>

96. Moreover, the IACHR has highlighted the need to design regulatory frameworks that respect the exercise of social protest and that limit it only to the extent necessary to protect other individual or social interests of equal relevance.<sup>139</sup> In this sense, it has indicated that it is also necessary to examine whether the imposition of criminal sanctions is, in fact, the least harmful means to restrict freedom of expression, exercised through the right of assembly, in the form of a demonstration on a public road or space.<sup>140</sup> The Commission will analyze below the different criminal offenses that may affect the right to freedom of expression and the right to peaceful assembly.

## 1. Criminal Offenses that Protect the Honor of Public Officials

97. The Commission has noted with concern that in some countries of the region the so-called "contempt laws" and criminal offenses of libel, slander, and defamation continue to be used to criminalize and punish critical statements concerning public officials and on issues of public interest, which has disproportionately affected the work of human rights defenders.
98. The use of these types of criminal offenses as a mechanism for the allocation of further responsibilities when in the face of specially protected speech violates the right to freedom of expression protected by Article 13 of the American Convention and Article IV of the American Declaration. In this regard, the Commission and the Inter-American Court have been emphatic in stating that such expressions enjoy greater protection under the inter-American human rights system.<sup>141</sup> Such

<sup>138</sup> I/A Court H.R., *Case Ivcher Bronstein v. Peru*. Merits, Reparations and Costs. Judgment of February 6, 2001. Series C No. 74; *Case of Herrera Ulloa v. Costa Rica*. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107; *Case of Ricardo Canese v. Paraguay*. Merits, Reparations and Costs. Judgment of August, 2004. Series C No. 111 31; *Case Palamara Iribarne v. Chile*. Merits, Reparations and Costs. Judgment of November 22, 2005. Series C No. 135; *Case Kimel v. Argentina*. Merits, Reparations and Costs. Judgment of May 2, 2008 Series C No. 177; IACHR, *1994 Annual Report*, Chapter V: Report On The Compatibility Of "Desacato" Laws With The American Convention On Human Rights. OAS/Ser.L/V/II.88. doc. 9 rev. February 17, 1995.

<sup>139</sup> IACHR, *A Hemispheric Agenda for the Defense of Freedom of Expression*, the Special Rapporteur for Freedom of Expression, OAS/Ser.L/V/II/CIDH/RELE/INF.4/09, of February 25, 2009 para. 69.

<sup>140</sup> IACHR, *Annual Report 2005 Vol. II: Report of the Office of the Special Rapporteur for Freedom of Expression*, Chapter V, para. 96.

<sup>141</sup> IACHR, *Annual Report 1994*. Chapter V: Report On The Compatibility Of "Desacato" Laws With The American Convention On Human Rights. OAS/Ser.L/V/II.88.doc. 9 rev. February 17, 1995; IACHR, *Annual Report 2004 Report of the Office of the Special Rapporteur for Freedom of Expression*. Chapter VI ("Desacato" Laws And Criminal Defamation). OAS/Ser.L/V/II.122. Doc. 5 rev. 1. 23 February 2005, para. 155 ff; IACHR, *Annual Report 2009 Report of the Special Rapporteur for Freedom of Expression*. Chapter III (Inter-American Legal Framework Of The Right To Freedom Of Expression). OAS/Ser.L/V/II.Doc 51. 30 December 2009. Page 245 et seq.; I/A Court H.R., *Ivcher Bronstein v. Peru case*. Merits, Reparations and Costs. Judgment of February 6, 2001. Series C No. 74; *Case of Herrera Ulloa v. Costa Rica*. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107; *Case of Ricardo Canese v. Paraguay*. Merits, Reparations and Costs. Judgment of August, 2004. Series C No. 111 31; *Palamara Iribarne v. Chile case*. Merits, Reparations and Costs. Judgment of November 22, 2005. Series C No. 135; *Case Kimel v. Argentina*. Merits,

protection is justified, among other reasons, due to the importance of a legal framework that promotes public deliberation; to the fact that officials have voluntarily exposed themselves to social control; and to have greater and better means to respond to public debate.<sup>142</sup>

99. In effect, in a democratic society entities and State officials must be exposed to scrutiny and criticism, and therefore their activities are embedded in the realm of public debate.<sup>143</sup> In this regard, the Commission has established that "the sort of political debate encouraged by the right to free expression will inevitably generate some speech that is critical of, and even offensive to, those who hold public office or are intimately involved in the formation of public policy."<sup>144</sup>
100. This is particularly true in any discussion seeking to contribute to the effective elimination of human rights violations. The complaints, the scrutiny of institutions and officials, as well as the dissemination of information and opinion, is an essential part of the work of human rights defenders. In this respect, the UN Declaration on Human Rights Defenders provides that in the defense of human rights, "Everyone has the right, individually and in association with others [...] to publish, impart or disseminate to others views, information and knowledge on all human rights and fundamental freedoms, [and to] study, discuss, form and hold opinions on the observance, both in law and in practice, of all human rights and fundamental freedoms and, through these and other appropriate means, to draw public attention to those matters."<sup>145</sup>
101. In a State in which the reporting of human rights violations is criminalized in order to protect the honor of public officials or where the research and criticism of governance is punishable through its most powerful tool, criminal law, citizens lose an essential tool in the fight for the protection and promotion of rights, especially those from historically marginalized and discriminated sectors, thus greatly affecting the democratic system.

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Reparations and Costs. Judgment of May 2, 2008 Series C No. 177. Technical Note on international standards regarding freedom of expression and crimes against honor and the suitability of the devices for the crimes against honor present in the draft reform Brazilian Penal Code. November 4, 2013 at: IACHR. *Annual Report 2013 Report of the Special Rapporteur for Freedom of Expression. Chapter II (Evaluation Of The State Of Freedom Of Expression In The Hemisphere)*, para. 125. November 4, 2013.

<sup>142</sup> I/A Court H.R.. *Case of Tristán Donoso v. Panama*. Preliminary Objection, Merits, Reparations and Costs. Judgment of January 27, 2009 Series C No. 193, para. 122.

<sup>143</sup> In this respect, Principle 11 of the Declaration of Principles on Freedom of Expression adopted by the IACHR states that "public officials are subject to greater scrutiny by society"; I/A Court H.R.. *Case of Herrera Ulloa v. Costa Rica*. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107, para. 129; *Case Kimel v. Argentina*. Merits, Reparations and Costs. Judgment of May 2, 2008 Series C No. 177, para. 86; *Case of Ricardo Canese v. Paraguay*. Merits, Reparations and Costs. Judgment of August 31, 2004. Series C No. 111, para. 103; IACHR, Annual Report 2009. Report of the Special Rapporteur for Freedom of Expression. Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OAS/Ser.L/V/II.Doc. 51. 30 December 2009, para. 106

<sup>144</sup> IACHR, *Annual Report 1994*. Chapter V: Report On The Compatibility Of "Desacato" Laws With The American Convention On Human Rights. Title III Section B. OAS/Ser.L/V/II.88. doc. 9 rev. February 17, 1995.

<sup>145</sup> UN, General Assembly. A/RES/53/144. March 8, 1999 Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms.



102. For the IACHR it is clear that there is no pressing social need that justifies the use of criminal mechanisms to punish such expressions. The use of criminal law is unnecessary and disproportionate, and constitutes a means of indirect censorship given its intimidating and inhibiting effect on the debate on matters of public interest and human rights defense.<sup>146</sup> In light of the inter-American standards, the protection of a person's reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person, or a private person who has voluntarily become involved in matters of public interest,<sup>147</sup> always in adherence to the principles of democratic pluralism. Hence, the IACHR has stated that "the imposition of criminal penalties on offenses against public officials in relation to the performance of their duties is contrary to the principles of necessity and proportionality in the framework of a democratic society."<sup>148</sup>

### a. "Desacato" Laws

103. The Inter-American doctrine has held that the special dispositions or the aggravation of sentences in the Criminal Code in order to especially protect the reputation of public officials, generally known as "desacato laws" (contempt laws), restrict freedom of expression and the right to information and are *per se* incompatible with the American Convention.<sup>149</sup>

104. According to the definition provided by the IACHR, these laws "are a class of legislation that criminalizes expression which offends, insults, or threatens a public

<sup>146</sup> IACHR, Arguments before the Inter-American Court in the case of Herrera Ulloa vs. Costa Rica. Transcribed I/A Court H.R., *Case of Herrera Ulloa v. Costa Rica*. Judgment of July 2, 2004. Series C No. 107, para. 101.2); IACHR. Arguments before the Inter-American Court in the *Case of Ricardo Canese v. Paraguay*. Transcribed at: I/A Court H.R., *Case of Ricardo Canese v Paraguay*. Judgment of August 31, 2004. Series C No. 111, para. 72.h).

<sup>147</sup> In this respect, Principle 10 of the Declaration of Principles on Freedom of Expression adopted by the IACHR provides that "Privacy laws should not inhibit or restrict investigation and dissemination of information of public interest. The protection of a person's reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest. In addition, in these cases, it must be proven that in disseminating the news, the social communicator had the specific intent to inflict harm, was fully aware that false news was disseminated, or acted with gross negligence in efforts to determine the truth or falsity of such news." IACHR, *Declaration of Principles on Freedom of Expression*.

<sup>148</sup> IACHR. *Annual Report 2004 Report of the Office of the Special Rapporteur for Freedom of Expression*. Chapter VI ("Desacato" Laws And Criminal Defamation). OAS/Ser.L/V/II.122. Doc. 5 rev. 1. February 23, 2005, para. 11.

<sup>149</sup> In this respect, Principle 11 of the Declaration of Principles on Freedom of Expression adopted by the IACHR provides that: "Public officials are subject to greater scrutiny by society. Laws that penalize offensive expressions directed at public officials, generally known as 'desacato laws,' restrict freedom of expression and the right to information." IACHR, *Declaration of Principles on Freedom of Expression*. Likewise, IACHR, *1994 Annual Report*, Chapter V: Report On The Compatibility Of "Desacato" Laws With The American Convention On Human Rights. OAS/Ser.L/V/II.88. doc. 9 rev. 17 February, 1995; IACHR, *Annual Report 2004. Report of the Special Rapporteur for Freedom of Expression*. Chapter VI ("Desacato" Laws And Criminal Defamation). OAS/Ser.L/V/II.122. Doc. 5 rev. 1. February 23, 2005, para. 155 ff; IACHR, *Annual Report 2009. Report of the Special Rapporteur for Freedom of Expression*. Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OAS/Ser.L/V/II.Doc. 51. December 30, 2009. p. 245 et seq.



official in the performance of his or her official duties."<sup>150</sup> The Special Rapporteur for Freedom of Expression has found that "from the point of view of a purely dogmatic analysis of criminal behavior, *desacato* is simply a special type of libel or slander in which the victim is special (a public official)."<sup>151</sup>

105. Some States have justified these laws invoking various reasons, such as the protection of the proper functioning of public administration or the public order. As the IACHR noted, "Desacato laws are said to play a dual role. First, by protecting public functionaries from offensive and/or critical speech, these functionaries are left unhindered to perform their duties and thus, the Government itself is allowed to run smoothly. Second, *desacato* laws protect the public order because criticism of public functionaries may have a destabilizing effect on national government since, the argument goes, it reflects not only on the individual criticized but on the office he or she holds and the administration he or she serves."<sup>152</sup>
106. For the IACHR, these justifications do not find support in the inter-American legal framework. In the words of the IACHR, the existence of contempt laws "inverts the fundamental principle in a democratic system that holds the Government subject to controls, such as public scrutiny, in order to preclude or control abuse of its coercive powers. If we consider that public functionaries acting in their official capacity are the Government for all intents and purposes, then it must be the individual and the public's right to criticize and scrutinize the officials' actions and attitudes in so far as they relate to the public office."<sup>153</sup>

## **b. Other Criminal Offenses such as Defamation, Libel, and Slander**

107. The IACHR notes that, in the legal systems of States, other criminal offenses such as defamation, slander, and libel continue to be used as tools to prosecute, punish, and silence both journalists and human rights defenders who report or express critical opinions regarding acts of public officials or public figures on issues relating to the public interest or for the poor performance of their functions.<sup>154</sup>

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<sup>150</sup> IACHR, *1994 Annual Report*, Chapter V: Report On The Compatibility Of "Desacato" Laws With The American Convention On Human Rights. OAS/Ser.L/V/II.88. doc. 9 rev. February 17, 1995.

<sup>151</sup> IACHR, *Annual Report 2002. Report of the Special Rapporteur for Freedom of Expression*. Chapter V. OAS/Ser.L/V/II.117. Doc. 1 rev. 1. March 7, 2003, para. 21.

<sup>152</sup> IACHR, *1994 Annual Report*, Chapter V: Report On The Compatibility Of "Desacato" Laws With The American Convention On Human Rights. OAS/Ser.L/V/II.88. doc. 9 rev. February 17, 1995.

<sup>153</sup> IACHR, *1994 Annual Report*, Chapter V: Report On The Compatibility Of "Desacato" Laws With The American Convention On Human Rights. OAS/Ser.L/V/II.88. doc. 9 rev. February 17, 1995. In this sense, Principle 11 of the Declaration of Principles on Freedom of Expression adopted by the IACHR in 2000, indicates that "Public officials are subject to greater scrutiny by society. Laws that penalize offensive expressions directed at public officials, generally known as "desacato laws," restrict freedom of expression and the right to information."

<sup>154</sup> IACHR, 150 Period of Sessions, Hearing on the "*Situation of Human Rights of Journalists in Cuba*", March 25, 2014. For example, in Cuba, according to information submitted to the IACHR, Law 88 for the Protection of National Independence and the economy of Cuba, criminalizes defenders by making use of their right to freedom of expression through the application of penal types such as "desacato." This also occurs through other criminal charges such as assault, resistance, and the proclivity towards crime, and other crimes such as

These measures constitute unnecessary and disproportionate measures on the exercise of freedom of expression with regard to matters of public interest, given their silencing effect that is incompatible with a democratic society.

108. In this regard, the UN Special Rapporteur on the situation of human rights defenders, in her 2012 Report on the situation of human rights defenders, expressed concern regarding the use of this type of criminal legislation against defenders to silence public criticism and hinder public regarding human rights issues, for which public officials are generally accountable. In this sense, similar to the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, she has considered that the criminal defamation inevitably leads to censorship, and impedes expression of dissent, in contravention of the right to freedom of expression, and has thus called on States to decriminalize defamation.<sup>155</sup> An example on the information the IACHR has received concerns the situation of Gladys Lanza:

According to information received by the Commission, human rights defender Gladys Lanza, Director of the Women's Movement for Peace "Visitación Padilla" in Honduras, was sentenced on March 26, 2015 to one year and six months of imprisonment for the crime of defamation, which also entailed as an additional punishment her disqualification and civil interdiction during the time of sentence. As reported, the criminal proceedings against her were initiated following a complaint presented by the former director of the Foundation for the Development of Social Urban and Rural Housing (FUNDEVI), Juan Carlos Reyes, for a series of statements that the defender made on November 15, 2010 during a protest outside the headquarters of the Foundation. Such statements were related to the prosecution and defense promoted by the Women's Movement for Peace in favor of a FUNDEVI employee who reported to the organization the sexual harassment and dismissal by the former director of the foundation. The Commission recalls that such expressions are specially protected by Article 13 of the ACHR and in these cases the use of criminal law has a particularly serious effect for a democratic society as it can lead to inhibit the work of women human rights defenders and the reporting of violence against women.<sup>156</sup>

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defamation of institutions and organizations, and heroes and martyrs. In this sense, according to information received, at least twenty journalists have been condemned to prison sentences, in some cases up to 20 years in prison under Law 88 of 1999. IACHR, Hearing "*Situation of the right to Freedom of Expression in Cuba*", 147<sup>th</sup> Period of Sessions, March 11, 2013.

<sup>155</sup> UN General Assembly, Human Rights Council, A/67/292, Report of the Special Rapporteur on the situation of human rights defenders, August 10, 2012, para. 57.

<sup>156</sup> On February 5, 2015, the IACHR issued a communication to the State on the basis of Article 41 of the American Convention requesting information on these facts. The State submitted a response to the request dated March 12, 2015.

109. The IACHR and its Special Rapporteurship on Freedom of Expression have emphasized that the imposition of criminal liability, such as under the criminal defamation laws, to protect the honor and reputation of public officials, or candidates for public office, causes fear and has a chilling, inhibitive effect on the practice of critical expression and on journalism in general, preventing debate on matters of interest to society. It has also been underscored that there are other, less restrictive means by which persons involved in matters of public interest can defend their reputation from unfounded attacks.<sup>157</sup> In this regard, the Commission has noted that "it is necessary to decriminalize speech that criticizes State officials, public figures, or, in general, matters of public interest; the foregoing is so because of the paralyzing effect or the possibility of self-censorship caused by the mere existence of laws that provide criminal penalties for those who exercise the right to freedom of expression in such a context."<sup>158</sup>
110. The Court ruled in a similar sense in the case of *Kimel vs. Argentina*, in which it ordered the Argentine State, among others, to adapt its domestic law to the American Convention as it pertains to the crimes of slander and defamation to ensure protection of the right to freedom of expression.<sup>159</sup> In its judgment, the Court found violations of Article 13 and Article 9 of the American Convention as a result of the criminal conviction for libel levied against Eduardo Kimel for having published a book that criticized the way a judge had conducted the investigation on a massacre committed during the years of the dictatorship. The Inter-American Court affirmed that the punitive power of the State had been used disproportionately. In reaching this conclusion, the Court took into account not only the highest level of protection enjoyed by the statements concerning the conduct of a public official, but also other reasons, including that Argentine criminal legislation regarding offenses of libel and defamation were extremely vague and ambiguous, thus contradicting the requirement of strict legality.<sup>160</sup>
111. In this regard, the Court noted that the criminalization of libel<sup>161</sup> and slander<sup>162</sup> did not provide legal certainty. According to the Court, the examined offenses did not clearly define the offending conduct, nor set their elements, which is necessary to

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<sup>157</sup> IACHR, *Annual Report 2009. Report of the Special Rapporteur for Freedom of Expression*. Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OAS/Ser.L/V/II.Doc. 51. December 30, 2009, para. 113.

<sup>158</sup> IACHR, *Annual Report of the Special Rapporteur for Freedom of Expression*, Chapter V. "DESACATO" LAWS AND CRIMINAL DEFAMATION, 2002, para. 22.

<sup>159</sup> I/A Court H.R., *Case Kimel v. Argentina*. Merits, Reparations and Costs. Judgment of May 2, 2008 Series C No. 177, para. 128.

<sup>160</sup> I/A Court H.R., *Case Kimel v. Argentina*. Merits, Reparations and Costs. Judgment of May 2, 2008 Series C No. 177, para. 76.

<sup>161</sup> At the time of the events, the Argentine Penal Code criminalizes libel as "The false imputation of a crime that results in public action, shall be punished with imprisonment of one to three years."

<sup>162</sup> At the time of the events, the Argentine Penal Code criminalizes slander as "He who dishonor or discredit of another, shall be punished by a fine of one thousand five hundred to ninety thousand pesos or imprisonment of one month to one year."

disassociate them from behaviors not punishable or illicit behaviors punishable with no penal sanctions.<sup>163</sup>

112. Given the breadth and vagueness of such norms, the IACHR has stressed that the mere threat of being prosecuted criminally for critical statements on matters of public interest may lead to self-censorship. The IACHR stated this in its Merits Report No. 88/10 issued in the case of Néstor José and Luis Uzcátegui and others with respect to Venezuela.<sup>164</sup> In this case, the IACHR concluded that the Venezuelan State had violated the right to freedom of expression of human rights defender Luis Enrique Uzcátegui, who was the subject of a complaint for defamation, by a police commander, who led to the opening of criminal proceedings against him for five years. The defender had denounced the murder of his brother Néstor Uzcátegui before the prosecutor and said, through different media outlets that, in his opinion, the then Commander General of the Armed Police Forces of the Falcon State in Venezuela was responsible for several killings carried out by "death squads" under his command.
113. The IACHR considers that "it is natural that the allegations of serious human rights violations may offend the honor and reputation of whoever is involved in those complaints." Consequently, it stated that "an exegetical application of the crimes against honor could lead to prevent such allegations to be made." For the Commission, the criminalization for defamation in the Venezuelan Penal Code "is of such ambiguity and breadth that allows any complaint, criticism or objection to the actions of public authorities, including those behaviors previously prohibited by the laws of contempt to give origin to long criminal proceedings that in and of themselves and pose psychological, social and economic costs that the person is not required to bear given the ambiguous nature of the rule it protects."
114. Therefore, the Commission concluded that the mere existence of a criminal norm of these characteristics applied over five years to Luis Enrique Uzcátegui "deters others from making complaints on human rights material and even of issuing any critical opinion regarding the action of the authorities. This is a result of the permanent threat posed to people being subjected to criminal proceedings that can lead to severe penalties and fines."<sup>165</sup>
115. In its judgment on this case, the Inter-American Court considered that the public statements made by Luis Enrique Uzcátegui about the actions of a police commander should "be understood as part of a broader public debate about the possible involvement of State security forces in serious human rights violations."<sup>166</sup> Given the relevance of such claims, the Court held that the existence of criminal proceedings, their duration in time, and the circumstance of the high-

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<sup>163</sup> I/A Court H.R., *Case Kimel v. Argentina*. Merits, Reparations and Costs. Judgment of May 2, 2008 Series C No. 177, para. 66. ff

<sup>164</sup> IACHR, Report No. 88/10. Case No. 12.661.Néstor José and Luis Uzcátegui and others. Venezuela. July 14, 2010.

<sup>165</sup> IACHR, Report No. 88/10. Case No. 12.661.Néstor José and Luis Uzcátegui and others. Venezuela. July 14, 2010, para. 279.

<sup>166</sup> I/A Court H.R., *Case Uzcátegui et al v. Venezuela*. Merits and Reparations. Judgment of September 3, 2012 Series C No. 249.

level official who filed the complaint "could have had an intimidating or inhibiting effect on the exercise of his freedom of expression, contrary to the State's obligation to guarantee the free and full exercise of this right in a democratic society."<sup>167</sup>

116. In light of the above, the Commission reminds States that they must refrain from criminalizing criticism or complaints of various kinds against officials. The Commission also reiterates that the coercive power of the State must not be exercised in a way that affects the freedom of expression of human rights defenders through the use of criminal law as an instrument to silence or intimidate those who exercise their right to express criticism, or lodge complaints of alleged human rights violations.

## 2. Laws that Criminalize Social Protest

117. The IACHR has received information indicating that in some States criminal offenses are misused to criminalize human rights defenders involved in social protests under the pretext of protecting the right to freedom of movement, as well as the safety of traffic and means of transportation. Moreover, it has learned that some States require a prior permission to hold a demonstration, and according to certain laws, failing to have such prior permission is met with criminal sanctions. The Commission has also been informed about the misapplication of other criminal offenses, such as resisting arrest or damages in the context of demonstrations dispersed by the police. Among other examples:

Regarding Argentina, the Commission learned of the start of several criminal proceedings against indigenous leader Felix Diaz and other community members from the Qom Potae Napocna Navogoh "La Primavera" ("Qom community") on charges of assault of authority, minor and serious injuries, weapons theft, incitement to commit crimes, armed attack against the authority, usurpation, roadblock, sexual abuse, and murder.<sup>168</sup> The criminal case relates to events that occurred on the morning of November 23, 2010 in the blocking of the national route 86 by indigenous persons in the defense of their lands where a university campus was planning to be built. On that morning, an individual made a complaint for the cutting of a wire fence, which led eight police officers to arrive at the scene, and subsequently a police repression that ended the life of a community member and a police officer and caused injuries to several people.

<sup>167</sup> I/A Court H.R., *Case Uzcátegui et al v. Venezuela*. Merits and Reparations. Judgment of September 3, 2012 Series C No. 249.

<sup>168</sup> Response of the Central de Trabajadores de Argentina (CTA Autonomous) questionnaire for the preparation of the report on criminalization of human rights defenders through the misuse of criminal law, September 2014.

Originally the Federal Court of Appeal overturned the proceedings against Diaz by dismissing the case. The prosecutor of said Chamber, when requesting the dismissal, stated that "the actors of a social protest in no way may be liable to prosecution." For its part, the Court found that the authorities of the province of Formosa had neglected the multiple claims made by indigenous communities in violation of provisions of a higher order, leading such groups to the extreme end of making claims, through the only way they understand is effective, and stressed that the various ethnic groups enjoy special constitutional protection since 1994. However, the First Criminal Chamber of Formosa decided to revoke the dismissal of Felix Diaz, and to recommend the reclassification of the complaint as the instigator of the murder of the policeman<sup>169</sup>. As indicated by the Centro de Estudios Legales y Sociales (CELS), the case was put together by the provincial police in order to criminalize the members of the community given that the evidence was not reviewed. In addition, various irregularities allegedly took place throughout the investigation, particularly in the testimonies and evidence produced by the police.<sup>170</sup> After these events, in April 2011 the IACHR, based on the information received, granted precautionary measures on behalf of members of the Qom community.<sup>171</sup> The request of precautionary measures alleged that members of the security forces committed a series of acts of violence against members of the community, which forced the leader Felix Diaz and his family to move to another area.

118. The Commission considers that social demonstration is important for the consolidation of democratic life and that, in general, this form of participation in public life, as an exercise of freedom of expression, has a crucial social interest. In many of the countries of the hemisphere, social protest and mobilization have become tools to petition the public authorities, as well as channels for public complaints regarding abuses or human rights violations.<sup>172</sup>
119. Social demonstrations, as a form of expression involving the exercise of related rights such as the right of citizens to assemble and demonstrate and the right to the free flow of opinions and information, referred to in Articles IV and XXI of the American Declaration and 13 and 15 of the American Convention, constitute vital

<sup>169</sup> Center for Legal and Social Studies, *Derechos humanos en Argentina* (Spanish only), Report 2013, pp. 231-232.

<sup>170</sup> Argentina Independent, *Qom leader Felix Diaz charged by Formosa*, November 12, 2013.

<sup>171</sup> IACHR, Precautionary Measure 404/10 regarding Argentina, April 21, 2011. The Inter-American Commission asked the State of Argentina adopt the necessary measures to guarantee the life and physical integrity of members of the indigenous community Qom Navogoh, "La Primavera" against possible threats, assault or harassment by members of the police, the public forces or other state agents. The Commission also asked the State to implement the necessary measures for the return of Felix Diaz and his family to the community safely.

<sup>172</sup> IACHR, *Annual Report 2005 Vol. II: Report of the Special Rapporteur for Freedom of Expression*. Chapter V, para. 1.

elements necessary for the proper operation of a democratic system that includes all sectors of society.<sup>173</sup> For example:

In Honduras, several protesters have faced criminal prosecution based on the criminal offense of unlawful assembly or demonstration enshrined in Article 331 of the Criminal Code.<sup>174</sup> The IACHR has indicated that it is concerned about the criminal accusations for the crime of "illegal demonstration" of a large number of detainees in the context of demonstrations. Particularly, in its report *Honduras: human rights and the coup d'état*, it noted that the description of this offense under Honduran criminal law is vague, thus allowing the competent authorities ample interpretative latitude and, therefore, broad discretionary authority.<sup>175</sup> For example, in August 2012, 24 farmers of Bajo Aguan in Honduras were arrested while participating in a protest outside the Supreme Court and charged with the crime of "illegal demonstration."<sup>176</sup> Regarding this particular criminal offense, the United Nations High Commissioner for Human Rights recommended to "revise or derogate national legislation incompatible with international standards, in particular provisions on crimes of sedition and illicit demonstrations."<sup>177</sup>

120. Though these rights are not absolute, their limitations must be expressly established by the law and be necessary to ensure respect for the rights of others or the protection of national security, public order or public health or morals. Such limitations must be reasonable in order to ensure the peaceful development of events, and must be governed "by the principles of legality, necessity and proportionality."<sup>178</sup>
121. With regard to the effective protection and guarantee of the right of assembly in the hemisphere and the need to reconcile its exercise with the State's obligations regarding the prevention of violent situations and maintaining conditions that make coexistence possible in a democratic society, the Commission has addressed social protest from both the legal and criminal perspective. This phenomenon has

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<sup>173</sup> *Ibidem*, para. 5.

<sup>174</sup> The Criminal Code of Honduras provides in Article 331 that "all those meetings in which people attend with weapons, explosives or blunt objects or other dangerous materials, with the purpose of committing a crime shall be considered illicit."

<sup>175</sup> IACHR, *Honduras: Human Rights and the coup d'état*, December 30, 2009, para. 381.

<sup>176</sup> Peace Brigades International response to the questionnaire for the preparation of the report on criminalization of human rights defenders through the misuse of criminal law, September 2014.

<sup>177</sup> UN General Assembly, Human Rights Council, A/HRC/13/66, Report of the United Nations High Commissioner for Human Rights on the violations of human rights in Honduras since the coup d'état on 28 June 2009, March 3, 2010, para. 48 and 85.

<sup>178</sup> IACHR, *Annual Report 2007*, Venezuela, OAS.Ser.L/V/II.130, December 29, 2007, para. 260.



been defined in some areas as the "criminalization of social protest" and has direct implications for the international obligations of the States.

122. In this regard, the Commission has noted that "governments may not invoke one of the lawful restrictions of freedom of expression, such as the maintenance of 'public order,' as a means to deny a right guaranteed by the Convention or to impair it of its true content. If this occurs, the restriction, as applied, is not lawful."<sup>179</sup>
123. Thus, what should be analyzed is whether the use of criminal sanctions is justified under the standard of the Inter-American Court, which has established that the restriction (criminalization) must satisfy a pressing public interest necessary for the operation of a democratic society.<sup>180</sup> It is also necessary to examine whether the imposition of criminal sanctions is, in fact, the least harmful means to restrict the freedom of expression, exercised through the right of assembly in the form of a demonstration on a public road or in a public space.<sup>181</sup>

### 3. Criminal Offenses that Prioritize the Right to Freedom of Movement over other Rights

124. The Commission has been informed regarding the use of criminal offenses that protect the right to free movement in order to criminalize defenders who legitimately exercise their right to publicly and peacefully protest and demonstrate. In this regard, in many countries the law contemplates criminal offenses of obstruction, road blockades,<sup>182</sup> nuisance, or any form of impairment of the normal operation of transportation means, as well as criminal offenses that protect the safety of traffic and means of transportation and communication. In many cases these criminal offenses are not clearly and precisely formulated which allow acts of arbitrariness in their application by public officials.
125. Freedom of assembly is enshrined in Articles XXI of the American Declaration and 15 of the American Convention. Regarding this right, the Commission has recognized that sometimes its exercise "is disruptive to the normal routine of daily life, especially in large urban centers; it may even cause problems or affect the exercise of other rights that the State has an obligation to protect and ensure, such as freedom of movement. However, such disruptions are part of the mechanics of a pluralistic society in which diverse and sometimes conflicting interests coexist and find the forums and channels in which to express themselves."<sup>183</sup>

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<sup>179</sup> IACHR, *2005 Annual Report*, Chapter V, Public Demonstrations As An Exercise Of Freedom Of Expression And Freedom Of Assembly, para.92.

<sup>180</sup> *Ibid.*, para. 96.

<sup>181</sup> IACHR, *Annual Report 2007*, Chapter IV, para. 266. See also: IACHR, Case of Ricardo Canese v Paraguay. Merits, Reparations and Costs. Judgment of August 31, 2004, Series C No. 111, paras. 96-98.

<sup>182</sup> Response of the Mexican Commission for the Defense and Promotion of Human Rights AC to the questionnaire for the preparation of the report on criminalization of human rights defenders through the misuse of criminal law, September 2014.

<sup>183</sup> IACHR, *Report on Citizen Security and Human Rights*, December 31, 2009 (OAS/Ser.L/V/II), para. 198.



126. In this regard, the Commission has indicated that in balancing, for example, freedom of movement and the right to assembly, it should be borne in mind that the right to freedom of expression is not just another right, but one of the primary and most important foundations of any democratic structure: the undermining of freedom of expression directly affects the central nerve of the democratic system.<sup>184</sup> As such, the UN Special Rapporteur on the right to freedom of peaceful assembly and association have referred to the Guidelines on Freedom of Peaceful assembly of the Office for Democratic Institutions and Human Rights (ODIHR) of the Organization for Security and Cooperation in Europe (OSCE), which state that "the free flow of traffic should not automatically take precedence over freedom of peaceful assembly."<sup>185</sup>

During its 149th Period of Sessions, the Commission received information on the reform of the Colombian Penal Code by Law 1453 of 2011 (Public Safety Act), which amended Article 353 of the Penal Code and added Article 353 A. The new wording of Article 353 of the Penal Code is as follows: "Article 353. Disturbance of public transport service, collective or official. Who by any unlawful means precludes the circulation or damages ship, aircraft, vehicle or motorized means for public transport, bus or official vehicle, is liable to imprisonment of four (4) to eight (8) years and a fine of thirteen point thirty-three (13.33) to seventy-five (75) legal minimum monthly wages." Article 353 also stipulates the following: "Article 353 A. Obstruction of roads that affect public order. Who by illegal means incites, directs, constrains, or provides the means to hinder temporarily or permanently, selectively or generally, roads or transportation infrastructure so that it infringes human life, public health, food security, the environment, or the right to work, will be liable to imprisonment of twenty four (24) to forty-eight months (48) and a fine of thirteen (13) to seventy-five (75) monthly legal minimum wages and loss of inability of rights and public office for the same term of imprisonment." These items were the subject of an

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<sup>184</sup> *Ibidem.*

<sup>185</sup> OSCE, Guidelines on Freedom of Peaceful Assembly, 2010.

action of unconstitutionality and declared enforceable by Constitutional Court judgment C-742/12.<sup>186</sup> However, civil society organizations indicate that "given the ambiguity and uncertainty of what a 'selective' or 'general' street obstruction under criminal law might consist of, virtually all citizen congregations to collectively protest offer security agencies, endowed with broad discretionary powers to prevent, hinder, suppress, or dissolve such protests by force under the same criminal law, the justification to consider that said protests are violations of criminal law [and to respond accordingly]."<sup>187</sup>

127. The Commission has indicated that strikes, road blockages, the occupation of public space, and even the disturbances that might occur during social protests may naturally cause annoyances or even damages that are necessary to prevent and repair. Nevertheless, disproportionate restrictions to protest, in particular in cases of groups that have no other way to express themselves publicly, seriously jeopardize the right to freedom of expression. The Commission has expressed its concern about the existence of provisions that make criminal offenses out of the mere participation in a protest, road blockages (at any time and of any kind), or

<sup>186</sup> Constitutional Court of Colombia, Judgment C-742-2012 (available in Spanish only). The Commission notes that this decision interprets Article 44 of Law 1453 of Colombia, which contains the criminal offense of obstruction of public roads affecting public order, which in its literal text is penalized with prison from twenty-four to forty-eight months and a fine of thirteen to seventy-five legal minimum monthly wages, and loss of inability rights and public office for the term of imprisonment for anyone who "incites through illegal means, direct, constrain or provide the means to block temporarily or permanently, selectively or generally, roads or transportation infrastructure so that infringes human life, public health, food safety, the environment or the right to work" unless the demonstrations are conducted with permission of the competent authority under Article 37 of the Constitution. In its decision, the Court stated that the incitement, constraint, address, or proportion of media, are punishable only when performed by illegal means. But the act cannot be considered typical of the crime of obstruction of public roads affecting public order, if not concretely "to block temporarily or permanently, selectively or generally, roads or transportation infrastructure." "By illegal means" must then be specifically the temporary or permanent, selective or general obstruction of roads or transportation infrastructure. In addition, according to the title of the criminal offense and the background of its issuance, it must necessarily present an effective "obstruction of public roads" that affects public order. The realization of the aforementioned verbs, despite being achieved by unlawful means and for the purpose of obstructing roads or transportation infrastructure, it is not enough alone. Additionally, there should be some true obstruction of those routes or infrastructure. It also states that "where the criminal law speaks of a 'permit,' this cannot be interpreted that authorities are competent to restrict the right of assembly, as such an understanding would be unconstitutional, according to the jurisprudence of this Court. In that sense, it is important to reiterate that in terms of freedoms of assembly and public demonstration, the Constitution recognizes the legislator competence to "set the notice to the authorities, determine where it is required and how it should be presented to report the date, time and place of the meeting or demonstration." However, Congress "cannot [...] create a basis for the assembly or demonstration to be forbidden." The permit referred to by this standard should then be understood as the result of a notice, which seeks not to request authorization to exercise a fundamental right, but "to inform the authorities to take the necessary measures to facilitate exercise the right without significantly hindering the normal development of community activities."

<sup>187</sup> Document submitted by the petitioners during the 149 Period of Sessions, Hearing on "*Human Rights and Social Protest in Colombia*", on October 31, 2013; Peace Brigades International response to the questionnaire for the preparation of report on criminalization of human rights defenders through the misuse of criminal law, September 2014.

acts of disorder that in reality, in and of themselves, do not adversely affect legally protected rights such as those to life, security, or the liberty of individuals.<sup>188</sup>

#### 4. Criminal Offenses that Punish the Lack of Authorization to Carry out Public Demonstrations

128. The IACHR has found that in some countries of the continent, human rights defenders are required to obtain prior permission to hold public demonstrations. When breaching such rules, human rights defenders are criminally prosecuted for crimes against State security or civil disobedience. In this regard:

According to information received by the Commission, Ecuador's Penal Code provides criminal penalties for conducting demonstrations without written permission of the competent authority. Article 153 of the Criminal Code of Ecuador states: "any person who promotes, directs, or organizes parades and public demonstrations in streets, squares, and other open spaces, provided that they are done without written permission of competent authority, in which the object of the meeting is determined, and the place, day and time in which it will take place is confirmed, will be punished with imprisonment of one to three months and a fine of one hundred to three hundred Sucres. Persons will be considered managers, promoters, and organizers when they appear as such, based on the speeches they make, for the printed materials they publish or distribute, for the words of command they pronounce, for the logos they wear, or the initial voluntary contribution of funds to the parade or demonstration, or any other significant event. The penalty will be between three to six months in prison, and a fine of two hundred to four hundred Sucres, when the parade or demonstration takes place against the prohibition issued by competent authority."<sup>189</sup>

129. The Commission reiterates that the exercise of the right to assembly through social protest should neither be subject to authorization by the authorities nor to excessive requirements that impede it from taking place. Any legal requirements that create the basis for prohibiting or restricting a meeting or demonstration – for example, through the requirement of obtaining a permit first - are not compatible with this right.<sup>190</sup> The IACHR has indicated, in this regard, that the requirement of

<sup>188</sup> IACHR, *A Hemispheric Agenda for the Defense of Freedom of Expression*, OAS/Ser.L/V/II CIDH/RELE/INF. 4/09, of February 25, 2009 para. 71.

<sup>189</sup> Penal Code of Ecuador (Spanish only).

<sup>190</sup> For example, the Commission has found as a restriction incompatible with freedom of assembly a legislation requiring a police permit that must be requested ten days prior to any public meeting, assembly, election, conference, parade, convention or sporting, cultural, artistic, or familiar event. Cf. IACHR, Annual Report 1979-1980, OAS/Ser.L/V/II.50, October 2, 1980, pp. 119-121. For example, the Commission has also cited the

prior notification must not be confused with the requirement of prior authorization granted in a discretionary manner,<sup>191</sup> the latter of which must not be established in the law or practice of the administrative authorities, even when it comes to public spaces.<sup>192</sup>

130. In case of considering that circumstances related to time, space, or mode constitute a danger to the protesters, the authorities must justify their decisions in order to find a better alternative. The IACHR reiterates that public demonstrations in which human rights defenders or other people are participating may only be restricted to prevent a serious and imminent threat from materializing, and a future, generic danger would be insufficient.<sup>193</sup> If the authority in question decides it is pertinent to change the circumstances of time and place, an appropriate and effective remedy must be provided to challenge the decision, a remedy that should be resolved by a different authority than the one that issued it.<sup>194</sup> Among the examples:

The Commission was informed that in Venezuela, following Decision No. 276 of April 24, 2014 of the Constitutional Chamber of the Supreme Court of Justice, it is mandatory to obtain authorization of the first civil authority of the jurisdiction to exercise the constitutional right of peaceful demonstration.<sup>195</sup> Conducting unauthorized demonstrations may result in criminal liability for the crime of disobedience to authority under Article 483 of the Criminal Code<sup>196</sup>. Specifically, in the words of that national Court, "it is mandatory for political parties and organizations as well as all citizens—when they decide to hold public meetings or manifestations—to exhaust the administrative authorization

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position of the Human Rights Committee of the United Nations, in that "the requirement that the police be notified prior to a demonstration is not incompatible with Article 21 of the International Covenant on Civil and Political Rights (freedom of assembly). However, the requirement of prior notification must not become the requirement of prior permission granted by an agent with unlimited discretionary powers. That is, you cannot prevent a demonstration because it is considered likely that it will threaten the peace, security or public order, regardless of whether you can prevent danger to peace or the risk of disorder altering the original conditions of the event (time, location, etc.). The restrictions on public demonstrations must be intended to prevent serious and imminent danger, sufficing an eventual danger."

<sup>191</sup> IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas*, OAS/Ser.L/V/II.Doc. 66, December 31, 2011, para. 137.

<sup>192</sup> Ibid. paras. 140 and 142.

<sup>193</sup> IACHR, *Report on the Situation of Human Rights Defenders in the Americas*, OAS/Ser.L/V/II.124.Doc.5 rev. 1 March 7, 2006, para. 58.

<sup>194</sup> IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas*, OAS/Ser.L/V/II.Doc. 66, December 31, 2011, para. 139.

<sup>195</sup> Response from ProBono Foundation of Venezuela to the questionnaire for the preparation of report on criminalization of human rights defenders through the misuse of criminal law, September 2014.

<sup>196</sup> Supreme Court, "TSJ se pronuncia sobre el derecho a la manifestación y el rol de las policías municipales en el control del orden público" (Spanish only), April 24, 2014.

procedure before the first civil authority of the relevant jurisdiction, to thus be able to fully exercise their constitutional right to peaceful demonstration."<sup>197</sup> That decision also states that "the first civil authority of the jurisdiction where the assembly, demonstration, or public meeting is sought to take place is not limited to the terms on which the request is made, and may not only deny authorization, but also modify it with regard to the place and the route chosen (day and time) if it decides to grant or authorize it."<sup>198</sup>

131. In this regard, the Commission believes that a social protest can occur in many different ways. In the region, some of them take the form of street closures, "cacerolazos" (pot-banging sessions), and vigils; however, in general, people come together to call on the government officials and to demand direct state intervention with respect to a particular social problem. For this reason and as the IACHR has already stated: "The conditions in which many of these demonstrations and demands occur are complex and require appropriate responses from the authorities for respecting and ensuring human rights."<sup>199</sup>

### ***C. Criminal Offenses that Punish the Receipt of Foreign Funding in the Framework of International Cooperation Agreements***

132. Human rights defenders and organizations defending and promoting human rights should have the right to seek and secure funding and resources from domestic, foreign, or international entities, including individuals, businesses, civil society organizations, governments, and international organizations.<sup>200</sup> This right has been recognized internationally as a positive development, and is independent of whether the organization is registered.<sup>201</sup>

<sup>197</sup> Decisión de N° 276 del 24 de abril de 2014 de la Sala Constitucional del Tribunal Supremo de Justicia de Venezuela, V. Consideraciones para decidir (Spanish only), para. 3.

<sup>198</sup> Decisión de N° 276 del 24 de abril de 2014 de la Sala Constitucional del Tribunal Supremo de Justicia de Venezuela, V. Consideraciones para decidir (Spanish only), para. 7.

<sup>199</sup> IACHR, *Report on the Situation of Human Rights Defenders in the Americas*, OAS/Ser.L/V/II.124.Doc.5 rev. 1 March 7, 2006, para. 59.

<sup>200</sup> UN General Assembly, Human Rights Council of the United Nations A/HRC/20/27, Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and Association, May 21, 2012, para.68.

<sup>201</sup> Article 6.f of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, adopted in 1981 by the United Nations General Assembly states that "the right to freedom of thought, conscience, religion or belief shall include, in particular [...] the [freedom] to solicit and receive voluntary financial and other contributions from individuals and institutions." In turn, Article 13 of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to promote and protect human rights and universally recognized fundamental freedoms, adopted by the United Nations General Assembly, provides "Everyone has the right, individually and in association with others, to solicit, receive and utilize resources for the express purpose of promoting and protecting human rights and

133. However, the Commission is aware of the application of criminal offenses to criminalize organizations and human rights defenders who receive foreign funding or support for the achievement of their causes. Under the conception that organizations that receive foreign funds support foreign intervention in domestic politics, some States have enshrined in their legislation offenses such as conspiracy to destabilize the state, support for terrorism and similar crimes. The Commission has received several complaints from human rights defenders who have been judicially processed under these charges or harassed because of their funding sources.<sup>202</sup>
134. The UN Rapporteur on the situation of human rights defenders has also documented this situation and in its 2012 report noted that "under the guise of protecting national sovereignty or national interests, some States have enacted legislation that outlaws associations working to defend political rights or engaging in political activities if they receive foreign funding."<sup>203</sup> Within the Inter-American system:

The Commission has learned that in Venezuela human rights defenders and non-governmental organizations have been accused of "treason" and "conspiracy" for receiving international funding, particularly from the United States.<sup>204</sup> In this regard, it received information on the statements made by the President of the Bolivarian Republic of Venezuela in his program "Alo Presidente" No. 182 of February 15, 2004. In this program, he accused the organization Súmate of committing the crime of high treason and conspiracy for receiving funding from the National Endowment for Democracy (NED), a U.S. institution that supports nongovernmental organizations in the promotion of democracy. The Public Prosecutor instituted criminal proceedings against the directors of the organization for the crime of "conspiracy to destroy the Republican political form", defined in Article 132 of the Penal Code of Venezuela. In this process, the Prosecutor General's Office alleged that processing and requesting money from a foreign organization

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fundamental freedoms through peaceful means, in accordance with article 3 of the present Declaration". See United Nations General Assembly, A/RES/53/144, March 8, 1999.

<sup>202</sup> Ibid, para. 200.

<sup>203</sup> UN General Assembly, Human Rights Council, A/67/292, Report of the Special Rapporteur on the situation of human rights defenders, August 10, 2012, para. 48.

<sup>204</sup> During 2010, the Commission received information, which was subsequently confirmed by the State pursuant to an inquiry conducted by the IACHR on the basis of the powers conferred by Article 41 of the American Convention, on the existence of an application to the Prosecutor General's Office to initiate a criminal investigation to organizations Espacio Público and the Institute for Press and Society (IPYS), to determine the source of financing of its activities. The application was based on the premise that the financing came from the State Department of the United States, which allegedly constituted a strategic relationship with the Venezuelan media with destabilizing purposes of the established order. According to this information, the complaint was filed during the month of July 2010 by members of the Movimiento Periodismo Necesario, an organization comprised of "revolutionary" journalists and communicators.

to carry out domestic political activities constitutes a crime.<sup>205</sup> Moreover, in 2010, the Law for the Defense of Political Sovereignty and National Self-Determination was adopted, which was published in the Official Gazette No. 39,580 of the Bolivarian Republic of Venezuela on December 23, 2010. This Law prohibits the financing of NGOs and political parties by foreign countries.<sup>206</sup> This law punishes those organizations and individuals who receive foreign funding with a fine equivalent to twice the amount received, without prejudice to the application of sanctions available under other laws.<sup>207</sup>

135. The limitations on foreign funding constitute an impediment for human rights defenders to perform their duties, since they depend on these resources to develop their activities of promotion and protection of human rights due to lack of funds in their own country. According to the UN Special Rapporteur on the situation of human rights defenders, "access to funding, the ability of human rights organizations to solicit, receive and use funding, is an inherent element of the right to freedom of association. In order for human rights organizations to be able to carry out their activities, it is indispensable that they are able to discharge their functions without any impediments, including funding restrictions."<sup>208</sup>
136. While among the reasons for a government to restrict foreign funding are preventing money laundering, terrorism financing, or increasing the effectiveness of foreign aid, the UN Rapporteur on the situation of human rights defenders has noted that it is concerning that in many cases "the real intention of governments is to restrict the ability of human rights organizations to carry out their legitimate work in defense of human rights."<sup>209</sup> In this regard, the UN Special Rapporteur on the rights to freedom of peaceful assembly and association has indicated that

<sup>205</sup> IACHR, *Democracy and Human Rights in Venezuela*, OAS/Ser.L/V/ II.Doc.54, December 30, 2009, paras. 606 and 607.

<sup>206</sup> Communication from the State, February 18, 2011.

<sup>207</sup> Articles 9 and 20, Law on Defense of Political Sovereignty and National Self-Determination of 2010. Additionally, during its 140th Period of Sessions, the Commission was informed of Judgment No 796 of the Supreme Court - Constitutional Chamber - of July 22, 2010, in response to the action for annulment brought by the civil association *Súmate* against processes for the referendum on constitutional amendments in February 2009. The IACHR was informed that through said judgment "*Súmate*" was refused one of the attributes of its juridical personality to act in judgment, or their "*locus standi*", on the basis of performing activities related to democracy; the rule of law or one of the "guiding principles of the Venezuelan State;" to participate in the "public debate, in order to influence the internal politics of the Nation;" and to receive funding from an entity related to another State. In that judgment, the Court further noted: "This courtroom should be reminded that obtaining financial resources, either directly or indirectly, from foreign States with the intent to be used to the detriment of the Republic, the people's interests (where sovereignty resides referred to in Article 5 of the Constitution of the Bolivarian Republic of Venezuela), political, social, or economic acts etc., could eventually constitute a crime under Article 140 of the Venezuelan Penal Code, including the single paragraph that prohibits enjoyment of the benefits of procedural law, or the application of alternative measures for compliance with it, included in First Title of the crimes against the independence and security of the Nation, specifically referred to the treason and other crimes against the Nation."

<sup>208</sup> UN General Assembly, A/64/226, Report of the Special Rapporteur on the Situation of Human Rights Defenders, August 4, 2009, para. 91.

<sup>209</sup> *Ibid*, para. 94.



"States have a responsibility to address money-laundering and terrorism, but this should never be used as a justification to undermine the credibility of the concerned association, nor to unduly impede its legitimate work."<sup>210</sup>

137. The Commission considers that one of the State's duties stemming from the freedom of association is to promote and facilitate the access of human rights organizations to financial cooperation funds, both national and foreign, as well as to refrain from restricting their means of financing.<sup>211</sup> Additionally, States must allow and facilitate human rights organizations' access to foreign funds in the context of international cooperation, in transparent conditions that take into account the leading role that human rights defenders have in the full achievement of the rule of law and strengthening of democracy.<sup>212</sup>
138. The Commission reiterates that every person 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, and that the exercise of this right implies the possibility of freely and effectively promoting and defending any right.<sup>213</sup> In this sense, the criminalization of human rights defenders based on receiving foreign funding is prohibited by international law. On this matter, Article 13 of the UN Declaration on Human Rights Defenders states that "everyone has the right, individually and in association with others, to solicit, receive and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means, in accordance with article 3 of the present Declaration."<sup>214</sup> Accordingly, States must refrain from imposing human rights organizations illegitimate restrictions on financing, including foreign financing.

#### ***D. Misuse of Counter-Terrorism Laws and Other Laws relating to National Security against Defenders***

139. The Commission has received information concerning the misuse of anti-terrorism laws and other laws concerning State security against defenders under the pretext of protecting security and public order, using criminal offenses such as sedition and terrorism. This is motivated by the current trend in many countries to assimilate human rights defenders, as well as social protest movements, with

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<sup>210</sup> UN General Assembly, Human Rights Council, A/HRC/20/27, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, May 21, 2012, para. 70.

<sup>211</sup> IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas*, OAS/Ser.L/V/II.Doc. 66, December 31, 2011, para. 179.

<sup>212</sup> IACHR, Press Release 118/10, *IACHR Concerned over International Cooperation Initiative in Venezuela*, Washington, DC, December 3, 2010.

<sup>213</sup> IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas*, OAS/Ser.L/V/II.Doc. 66, December 31, 2011, para. 185.

<sup>214</sup> UN General Assembly, A/RES/53/144, *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, March 8, 1999.



terrorist or subversive groups.<sup>215</sup> Such processes of criminalization are possible because the definitions of criminal offenses to punish conducts relating to terrorism are too vague or imprecise, leaving wide discretion to judicial officers who use them against defenders in order to prosecute them and limit their activities to promote and defend human rights. The IACHR has received information of concern indicating that the definitions of the crime of terrorism in the countries of Argentina,<sup>216</sup> Ecuador,<sup>217</sup> Venezuela,<sup>218</sup> and Peru<sup>219</sup> could be used

<sup>215</sup> UN General Assembly, Human Rights Council, A/HRC/16/51/Add.3 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, December 15, 2010, p. 2.

<sup>216</sup> The Commission received information on the implementation of Law No. 26,734 of Argentina. In December 2013, journalist Juan Pablo Suarez filmed the arrest and attack suffered by Nelson Villagran, a corporal who demanded wage increases as part of a protest in the province of Santiago del Estero. After he posted the video on a media outlet, he was arrested without a warrant and criminally prosecuted for the crime of sedition with the aggravating circumstance provided for in Article 41 of the Terrorism Act, which doubles the length of the sentence. Finally, the criminal trial judge rejected the terrorism charges.

<sup>217</sup> In Ecuador, the crime of terrorism is criminalized in Article 160.1, which states: "Those who, individually or joining associations, such as guerrilla groups, organizations, gangs, commandos, terrorist groups or in any other similar form, armed or not, claiming patriotic, social, economic, political, religious, revolutionary, proselitistic reivindications, racial, local, regional purposes, etc., commit crimes against the security of individuals or human groups of any kind or their property: either raiding, violating or destroying buildings, banks, stores, warehouses, markets, offices, etc.; either raiding or invading homes, rooms, schools, colleges, hospitals, clinics, convents, law enforcement buildings, military, police or paramilitary, etc.; subtracting or seizing assets or securities of any kind and amount; or abducting persons, vehicles, vessels or aircraft to demand ransom, put pressure on and demand a change of laws or orders and regulations legally issued or require competent authorities to release persons accused or convicted of political or common crimes, etc.; or occupying by force, by threat or intimidation, public or private places or services of any nature and type; or placing barricades, parapets, trenches, obstacles, etc., in order to confront the security forces in support of their intentions, plans, thesis or proclamations; or attacking, in any form, the community, their property and services, shall be punished with ordinary imprisonment of four to eight years and a fine of twenty thousand to fifty thousand Sucres. If during the commission of the crimes listed above people are injured, the perpetrators will be imposed the maximum penalty specified in the preceding paragraph and, if it results in the death of one or more persons, the penalty shall be rigorous imprisonment from twelve to sixteen years and a fine of fifty thousand to one hundred thousand Sucres. If the facts referred to in the first paragraph of this article only affect property in addition to the penalty imposed on him, the author will be sentenced to pay compensation for the damages caused." The UN Committee on Economic, Social and Cultural Rights has already referred to this offense and recommended that the State party establishes robust safeguards for the rights to freedom of assembly and to participate in peaceful demonstrations and that it regulates the use of force by law enforcement officers in connection with public demonstrations. See, UN Economic and Social Council, Concluding observations on the third report of Ecuador, adopted by the Committee on Economic, Social and Cultural Rights at its forty-ninth session, E/C.12/EQU/CO/3, November 30, 2012.

<sup>218</sup> In the case of Venezuela, the State adopted the anti-terrorism law of February 1, 2012. In addition to the enactment of this law, the creation of a National Bureau of Organized Crime was approved. The Venezuelan law, in its Article 4, defines a terrorist act as "that intentional act, which, by its nature or context, may seriously damage a country or an international organization, established as a criminal offense under Venezuelan law, committed with the aim of seriously intimidating a population; unduly compelling the governments or an international organization to do or abstain from doing any act; or seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization. These acts can be made through the following means: a) attacks upon a person's life which may cause death; b) attacks upon the physical integrity of a person; c) kidnapping or hostage taking; d) causing extensive destruction to a government or public facility, transportation systems, infrastructures, including information systems, fixed platforms on the continental shelf, a public place or private property, likely to endanger human life or result in major economic loss; e) seizure of aircraft, ships or other means of public or goods transport; f) manufacture, possession, acquisition, transport, supply or use of firearms, explosives, nuclear, biological and chemical weapons and research and development of

to criminalize the work of human rights defenders. Furthermore, both the Commission and the Court have previously analyzed the application of the crime of terrorism against indigenous leaders in Chile,<sup>220</sup> due to the contentious case, Norín

biological and chemical weapons; g) release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life; h) interfering with or disrupting the supply of water, power or other fundamental natural resource the effect of which is to endanger human lives." According to press reports, after arrests of people participating in protests in Venezuela in early 2014 took place, prosecutors have expressed their willingness to use the described law for those involved in the protests that took place. El Universal, [Crítican que justicia use la ley antiterrorista contra protestas](#) (Spanish only), March 3, 2014.

219 In the case of Peru, Article 2 of Decree-Law No. 25,475 contains a typical description of the crime of terrorism in the following terms: "whoever provokes, creates or maintains a state of intimidation, alarm or fear in the population or in a segment thereof, commits acts against life, bodily integrity, health, liberty and security of person or against property, against the security of public buildings, roads or means of communication or transport of any kind, electricity towers or transmission, motor installations or any other good or service, using weapons, explosive materials or devices or any other means capable of causing havoc or serious disturbance of the peace or affects the international relations or security of society and the State, shall be punished by imprisonment of not less than twenty years." In regard to the regulation of this offense, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism previously stated that "it should be brought into compliance with the principle of legality as enshrined in article 15 of the International Covenant on Civil and Political Rights and be, at the same time, formulated in a manner that restricts its application to crimes of a genuinely terrorist nature." UN General Assembly, Human Rights Council, A/HRC/16/51/Add.3, 16th session, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, December 15, 2010, p.20.

220 In the case of Chile, the provisions on terrorism are contained in Law 18,314. Article 1 of that Law states that "An offense will be considered a terrorist offense listed in Article 2 when the act is committed with the aim of producing in the population or part of it a justified fear to be the victim of offenses of the same kind, either by the nature and effects of the means employed or as a result of evidence indicating that it follows a premeditated plan to attack a category or group of people, or because it is committed to produce or inhibit resolutions of the authorities or impose demands to them." The breadth of this definition has allowed members of the Mapuche community in Chile to be accused of terrorism for acts of protest or social demands relating to the defense of the rights over their land. In this regard, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has stated that the legislation "has been invoked by the local public prosecutors and by the Ministry of the Interior and Public Security in a relatively defined number of emblematic cases, mostly involving multiple accused persons. The statistics demonstrate that Mapuche protests account for the vast majority of prosecutions under the anti-terrorism legislation. The definition of terrorism in the law is very broad, and depends upon proving the commission of a substantive criminal offence (such as arson) coupled with the necessary intent to instill fear in the population and thereby to influence government policy. Whilst this form of definition is not unique to Chile, it leaves a broad discretion to the prosecutor which can lead to unforeseeable and arbitrary application, and is therefore open to potential abuse." Finally, he added that "where a State retains a broad and subjective legal definition of terrorism, it is an essential minimum safeguard against abuse that there should be objective criteria for the exercise of prosecutorial discretion, and a consensus as to what forms of protests can properly be characterised as acts of terrorism. The Special Rapporteur considers that in Chile today there are no such objective criteria, and there is no such consensus." Statement by the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms in the fight against terrorism, July 30, 2013. The UN Special Rapporteur has also noted with concern that "the 2010 amendment does not define the protected legal right and maintains a reference to rights and behaviours already foreseen and protected by ordinary criminal law, including the crime of arson in an uninhabited place" He agrees with the Commission in signaling that the Chilean anti-terrorism law, "by allowing interpretation of terrorism to include behavior that exclusively violates property, ambiguities and confusion arise as to what the State deems a terrorist offence to be." See, UN General Assembly, Human Rights Council, A/HRC/25/59/Add.2 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson of April 14, 2014. The Commission, however, recognizes and welcomes the State's commitment, announced in June 2014 before the UN Human Rights Council and reiterated to the Commission during a visit to the country in December 2014, that it will no longer apply Law 18,314 to members of the Mapuche community. See AFP, ["Gobierno de Bachelet se compromete a no aplicar ley antiterrorista a mapuches"](#) (Spanish only),

Catrimán and others (leaders, members and activist of the Mapuche Indigenous People) v. Chile (discussed in greater detail below).

140. The importance of ensuring that domestic legal definitions on terrorism are formulated in a precise manner has been highlighted by various organs and experts from the United Nations, who have stressed that the vagueness facilitates judicial officers to make broad interpretations, punishing conducts that are not consistent with the entity, severity, and nature of the crime of terrorism.<sup>221</sup>
141. In this regard, the Human Rights Council of the United Nations has expressed its concern for the fact that "national security and counter-terrorism legislation and other measures, such as laws regulating civil society organizations, have been misused to target human rights defenders or have hindered their work and endangered their safety in a manner contrary to international law."<sup>222</sup> It has therefore urged States to include in their legislation clearly defined provisions consistent with international human rights law, including the principle of non-discrimination and that such legislation is not used to impede or restrict the exercise of any human right, including freedom of expression, association, and peaceful assembly, which are essential for the promotion and protection of other rights.<sup>223</sup> In particular, the Human Rights Council indicated that the offenses which qualified as terrorist acts must have a definition with transparent and predictable criteria.<sup>224</sup> In this sense, it has highlighted the importance for States to ensure that the measures to combat terrorism and preserve national security be in compliance with their obligations under international human rights law and do not hinder the work and safety of individuals, groups, and institutions engaged in promoting and defending human rights.
142. For his part, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, has stated that "the adoption of overly broad definitions of terrorism may lead to deliberate misrepresentations of the term, for example, to respond to demands and social movements of indigenous peoples, as well as unintentional violations of human rights. If the anti-terrorism legislation and related activities are not confined to combat behaviors that are really of a terrorist nature, the risk is that, if they have the effect of restricting the enjoyment of rights and freedoms, the

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published in *El Universal*, June 19, 2014; Telesur, "[Chile no aplicará Ley Antiterrorista a indígenas mapuches](#)," June 19, 2014.

<sup>221</sup> UN Human Rights Committee, CCPR/C/CHL/CO/5, Consideration of Reports submitted by States parties under article 40 of the Covenant Concluding observations of the Human Rights Committee, Chile, April 17, 2007 with, para. 7; UN General Assembly, Human Rights Council, A/HRC/6/17/Add.1 [Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms in the fight against terrorism](#), November 28, 2007, para. 20.

<sup>222</sup> UN General Assembly, Human Rights Council, A/HRC/RES/22/6, [Protecting human rights defenders](#).

<sup>223</sup> UN General Assembly, Human Rights Council, A/HRC/RES/22/6, [Protecting human rights defenders](#). p. 3.

<sup>224</sup> *Ibid.*, p.4.

principles of necessity and proportionality are violated, principles on which the restriction of any human rights is based."<sup>225</sup>

143. In the sphere of the inter-American system, both the Commission and the Inter-American Court have established parameters for the regulation and application of the criminal offenses of terrorism. The Inter-American Court has indicated that the regulation of such offenses imposes a necessary distinction between them and ordinary offenses, so that every person, as well as the criminal judge, has sufficient legal elements to predict under what type of offense is a conduct punishable. This is important given that the crimes of terrorism provide for the imposition of harsher prison sentences, and ancillary penalties and disqualifications with major effects on the exercise of other fundamental rights.<sup>226</sup>
144. In turn, the Special Rapporteur for Freedom of Expression of the IACHR noted in her 2013 report that the criminalization of speech relating to terrorism should be restricted to instances of intentional incitement to terrorism – understanding it as a direct call to participating in terrorism that is directly responsible for an increase in the likelihood of a terrorist act to take place, or to the actual participation in terrorist acts (for example by directing them).<sup>227</sup> The same standard should apply to cases where there is an intention to accuse a person for offenses such as treason or rebellion, or the dissemination of ideas or uncomfortable information for government authorities.
145. In its *Report on Terrorism and Human Rights*, the IACHR developed parameters for the application of such criminal offenses indicating that it is relevant to consider what kind of acts would fall within a definition of terrorism. In this regard, it concluded that "terrorist incidents can be described in terms of: a) the nature and identity of the perpetrators of terrorism; b) the nature and identity of victims of terrorism; c) the objectives of terrorism; d) the means employed to perpetrate terror violence."<sup>228</sup>
146. In light of the above, the Commission urges States to ensure that their anti-terrorism legislation is strictly in accordance with the above criteria. This will enable human rights defenders to conduct their activities without the risk of State persecution under anti-terrorism legislation.<sup>229</sup> Likewise, in accordance with the position of the UN Committee on Economic, Social and Cultural Rights, the Commission considers that States must clarify the scope of application of the

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<sup>225</sup> UN General Assembly, Human Rights Council, A/HRC/16/51/Add.3 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, December 15, 2010, paras. 26 and 27.

<sup>226</sup> I/A Court H.R., *Case Norín Catrimán and others (leaders, members and activist of the Mapuche Indigenous People) v. Chile*. Merits, Reparations and Costs. Judgment of May 29, 2014. Series C No. 279, para. 163.

<sup>227</sup> IACHR, Annual Report of the Rapporteurship on Freedom of Expression, Annual Report of the IACHR, 2013, OEA/Ser.L/V/II.149 Doc. 50, December 31, 2013, para. 391 (referencing the Joint Declaration on Defamation of Religions, and Anti-Terrorism and Anti-Extremism Legislation adopted on 2008).

<sup>228</sup> IACHR, Report on Terrorism and Human Rights, OAS/Ser.L/V/II.116, Doc. 5 rev. 1 corr., October 22, 2002, para. 226.

<sup>229</sup> UN General Assembly, Human Rights Council, A/67/292, Report of the Special Rapporteur on the situation of human rights defenders, August 10, 2012, para. 18.

criminal offenses established by counter-terrorism laws and restrict their application in contexts of social protests.<sup>230</sup>

147. With regard to the fight against terrorism, the Member States of the Organization of American States have stated that terrorism is a serious criminal phenomenon of deep concern to all Member States and have reaffirmed the need to adopt in the Inter-American system effective measures to prevent, punish, and eliminate terrorism through the broadest cooperation. They have also stressed that "that the fight against terrorism must be undertaken with full respect for national and international law, human rights, and democratic institutions, in order to preserve the rule of law, freedoms and democratic values in the Hemisphere."<sup>231</sup>
148. The Commission has noted that several States have adopted measures to prevent and punish terrorism offenses criminalizing behaviors with such character. In this regard, the Commission has stated that "Some states have endeavored to prescribe a specific crime of terrorism based upon commonly-identified characteristics of terrorist violence. Other States have chosen not to prescribe terrorism as a crime that is freestanding, but rather have varied existing and well-defined common crimes, such as murder, by adding a terrorist intent or variations in punishment that will reflect the particular heinous nature of terrorist violence. Whichever course is chosen, OAS Member States should be guided by the basic principles articulated by the Inter-American Court and Commission on this issue."<sup>232</sup>
149. The Commission considers that, in adopting anti-terrorism laws, States are obligated to respect the presumption of innocence, the *non-bis-in-idem* principle, and the *nullum crimen sine lege* and *nulla poena sine lege* principles, as well as the precept that no one should be convicted of a criminal offense except on the basis of individual criminal responsibility.<sup>233</sup> Despite this duty, both the Commission and the Inter-American Court have observed and concluded that "certain domestic anti-terrorism laws [...] violate the principle of legality because, for example, those laws have attempted to prescribe a comprehensive definition of terrorism that is inexorably overbroad and imprecise, or have legislated variations on the crime of "treason" that denaturalizes the meaning of that offense and creates imprecision and ambiguities in distinguishing between these various offenses."<sup>234</sup>
150. In turn, civil society organizations have shown that, in some cases, the lack of precision in the definition of crimes related to terrorism allows for aspects that do not provide sufficient predictability of the criminalized conduct to be taken into

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<sup>230</sup> UN Economic and Social Council, E/C.12/EQU/CO/3, Concluding observations of the Committee on the third periodic report of Ecuador as approved by the Committee at its forty-ninth session, November 30, 2012.

<sup>231</sup> Inter-American Convention against Terrorism, AG/RES. 1840 (XXXII-O/02) adopted at the first plenary session held on June 3, 2002, eighth preambular paragraph.

<sup>232</sup> IACHR, Report on Terrorism and Human Rights, OAS/Ser.L/V/II.116, Doc. 5 rev. 1 corr., October 22, 2002, para. 226.

<sup>233</sup> *Ibid.*, para. 222.

<sup>234</sup> IACHR, Report on Terrorism and Human Rights, OAS/Ser.L/V/II.116, Doc. 5 rev. 1 corr., October 22, 2002, para. 226.

consideration in the determination of the subjective and objective elements and operative verb of the crime. In this way, an act of social protest by human rights defenders may be classified as a crime.<sup>235</sup> For instance:

The Commission and other international organizations for the protection of human rights have expressed concern about the existence of a pattern of selective application of the Chilean anti-terrorism legislation to individuals belonging to the Mapuche indigenous people, in the frame of their processes of mobilization and political and social protest. This pattern has been enabled by the breadth of the definition of terrorist offenses: under Article 1 of Law 18.314 of 1984<sup>236</sup> (the “Counter-Terrorism Act”), the act is defined as “[an] offense [ ] committed to force decisions from the authorities or to impose demands, and the intent being “to instill [...] fear in the general population.” Under Article 1(1), the intent is presumed when the offense is committed using explosive or incendiary devices. Due to these provisions, a significant number of cases have been prosecuted under Law 18.314, especially between 2000-2005.<sup>237</sup> In its report on the visit to Chile, presented in 2003, the UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people noted that leaders and members of the Mapuche indigenous people, perceived the State’s reaction in applying the Act against their protest activities as persecution designed to curb their mobilization and protest processes through the courts.<sup>238</sup> He recommended to the State that “Under no circumstances should legitimate protest activities or social demands by indigenous organizations and communities be outlawed or penalized,”<sup>239</sup> and that “Charges for offences in other contexts (“terrorist threat”, “criminal association”) should not be applied to acts related to the social struggle for land and legitimate indigenous claims”.<sup>240</sup> Subsequently, in his 2005 report, the Special

<sup>235</sup> David Cordero Heredia, INREDH, *¿Terrorismo en el Ecuador? Uso del Derecho Penal del Enemigo y el discurso del terror: caso “10 de Luluncoto”*. (Spanish only).

<sup>236</sup> Chilean Law No. 18,314, which defines terrorist behaviors and establishes penalty, published in the Official Gazette of 17 May 1984.

<sup>237</sup> UN Economic and Social Council, Human Rights Commission, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2003/56 - Mission to Chile. UN Doc. E/CN.4/2004/80/Add.3, November 17, 2003, para. 35.

<sup>238</sup> UN Economic and Social Council, Human Rights Commission, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2003/56 - Mission to Chile. UN Doc. E/CN.4/2004/80/Add.3, November 17, 2003, para. 38.

<sup>239</sup> *Ibid.*, para. 69.

<sup>240</sup> UN Economic and Social Council, Human Rights Commission, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2003/56 - Mission to Chile. UN Doc. E/CN.4/2004/80/Add.3, November 17, 2003, para. 70.

Rapporteur expressed concern about the unjustified application of the Counter-Terrorism Act in the case of activities related to social issues or land rights.<sup>241</sup> The Inter-American Court, for its part, found in a 2014 decision that the above-mentioned provisions of the law violated the principle of legality and the presumption of innocence, in relation to the State's obligation to respect and ensure rights, as established in Articles 9, 8(2), and 1(1), respectively, of the American Convention, as the way the law is written preconceives the accused's responsibility for the offence.<sup>242</sup>

151. Furthermore, the IACHR has noted the entry into force of "anti-terrorism" laws that prohibit provision of "material support" to designated terrorist organizations. However, these same laws have also been used to limit activities of human rights organizations, who seek to provide specialized assistance to groups qualified by States as terrorist groups, even where the assistance or advice relates to the defense of their human rights. In this regard, the Commission is aware of the existence of laws that criminalize defenders for providing support, consulting, or training to organizations considered as terrorist under the crime of "supporting terrorism."<sup>243</sup> Among other examples:

In June 2010, the Supreme Court of the United States, referring to the material support of terrorism provisions as codified in U.S. Code Title 18 Section 2339B(a)(1),<sup>244</sup> held that the prohibition of supporting groups considered as terrorists also extends to peaceful activities under international humanitarian law.<sup>245</sup> This case concerned the Humanitarian Law Project (HLP) a U.S. based NGO, which wanted to offer legal counsel, promotion, and training services on the use of UN special procedures and peaceful conflict resolution the Kurdistan Workers Party (PKK), considered a terrorist organization on the United States list. The Supreme Court

<sup>241</sup> UN Economic and Social Council, Human Rights Commission, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2003/56 - Mission to Chile. E/CN.4/2005/88/Add.1, February 16, 2005.

<sup>242</sup> I/A Court H.R., Case Norín Catrimán and others (leaders, members and activist of the Mapuche Indigenous People) v Chile. Merits, Reparations and Costs. Judgment of May 29, 2014. Series C No. 279, paras. 171, 173-4.

<sup>243</sup> FIDH, Annual Report 2013, Violations of the right of NGOs to funding: from harassment to criminalisation, 2013, p.78; American Bar Association's response to the questionnaire for the preparation of the report on criminalization of human rights defenders through the misuse of criminal law, September 2014.

<sup>244</sup> The material support for terrorism provision was first adopted in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and codified in 18 U.S.C. § 2339B(a)(1). It was later modified to include "expert advice or assistance" as terms of such support in the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, known as the "Patriot Act."

<sup>245</sup> *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010). See also FIDH, Annual Report 2013, Violations of the right of NGOs to funding: from harassment to criminalisation, 2013, p.77.



concluded that by adopting the Patriot Act, Congress and the Executive had wanted to prohibit any contribution to terrorist groups such as the PKK, because "it serves to legitimize and further their terrorist means."<sup>246</sup> According to the Observatory for the Protection of Human Rights Defenders, this decision means that donors cannot finance consulting services, training, and other areas for the peaceful resolution of conflicts involving an allegedly terrorist organization without being exposed to criminal proceedings for "support for terrorism"<sup>247</sup> and other types of lawsuits. In addition to making it impossible for the beneficiary organizations to request funding for their activities, many organizations, particularly those providing humanitarian aid, have ceased or reduced their provision of such aid in war-torn areas where terrorist organizations are active for fear of being prosecuted.<sup>248</sup>

152. The UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms in the fight against terrorism has often indicated that "the crimes of "material support", "terrorist activity" and "terrorist financing" are formulated vaguely, allowing for the inclusion of activities unrelated to terrorism, such as those oriented to the promotion and defense of human rights. At the same time, he has observed that government authorities resort to the qualification of "terrorist", without a prior determination by the judiciary power, which contradicts the presumption of innocence.<sup>249</sup> In this regard, he has recommended that "States that decide to criminalize the individual belonging to a 'terrorist organization' should only apply such provisions after the organization has been qualified as such by a judicial body."<sup>250</sup>
153. In addition, the IACHR has expressed concern about the initiation of criminal proceedings against lawyers as a result of legal counsel provided to persons accused of the crime of terrorism. In this regard, in its *Second Report on the Situation of human rights Defenders in the Americas* it has expressly stated that "Vague notions such as providing communications support to terrorism or extremism, the 'glorification' or 'promotion' of terrorism or extremism, and the

<sup>246</sup> 561 U.S. 1, 25 (2010).

<sup>247</sup> FIDH, Annual Report 2013, [Violations of the right of NGOs to funding: from harassment to criminalisation](#), 2013, p.77-78.

<sup>248</sup> Sam Adelsberg, Freya Pitts and Sirine Shebaya, "The Chilling Effect of the 'Material Support' Law on Humanitarian Aid: Causes, Consequences, and Proposed Reforms," 4 Harv. J. Nat'l. Sec. 1, 283 (2013). As Holder is the most recent U.S. Supreme Court case on this topic, the Commission notes that, in related spheres, the Supreme Court is maintaining its position. On April 28, 2014, the Court declined to hear a challenge, presented by a group of writers and activists who interviewed terrorists, to the National Defense Authorization Act, which allows the U.S. to indefinitely detain people believed to have helped the terrorist groups of al-Qaeda or the Taliban. See Lawrence Hurley, "[Supreme Court rejects hearing on military detention case](#)," Reuters (Apr. 28, 2014).

<sup>249</sup> UN General Assembly, A/61/267, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms in the Fight Against Terrorism, August 16, 2006, para. 26.

<sup>250</sup> UN General Assembly, A/61/267, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms in the Fight Against Terrorism, August 16, 2006, para. 26.



mere repetition of statements by terrorists, which does not itself constitute incitement, should not be criminalized."<sup>251</sup>

154. In turn, the UN Special Rapporteur on the situation of human rights defenders expressed dismay after receiving information indicating that defenders who provided legal assistance to people detained under laws relating to national security were arrested and charged for exercising their functions and they even lost their license.<sup>252</sup>

The Commission stated in its *Report on the Situation of Human Rights in Peru* published in 2000, that human rights defenders are often victims of all types of attacks and harassment, "including legal actions brought to intimidate them," and that some of these legal proceedings have not been initiated to determine rights and responsibilities pursuant to the purposes of the law, but as a reprisal against the lawyers of persons accused of the crime of terrorism.<sup>253</sup> Particularly, it noted that after the promulgation of Law No. 25,475, the Anti-Terrorism Act, criminal proceedings have been brought against defense attorneys for the crimes of rebellion or forming illegal groups, leading even to their detention. The Commission has received numerous complaints consistently indicating that, far from being undertaken based on relevant evidence, such proceedings have apparently been sponsored by sectors of the security forces for the purpose of intimidating attorneys willing to defend persons accused of terrorism.<sup>254</sup> Recently in the report on the merits of Case No. 11.568, *Luis Antonio Galindo Cárdenas and family vs. Peru*, which was presented to the Court on January 19, 2014, the IACHR concluded that the Peruvian State was responsible for violation of the principle of legality and the right to freedom from ex post facto laws, because it criminalized legal practice, particularly, technical defense, through the arbitrary application of Article 4 of Decree Law 25475 related to acts of collaboration with terrorists.<sup>255</sup>

155. In this respect, Principle 16 of the UN Basic Principles on the Role of Lawyers provides that "Governments shall ensure that lawyers (...) are able to perform all of their professional functions without intimidation, hindrance, harassment or

<sup>251</sup> IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas*, OAS/Ser.L/V/II.Doc. 66, December 31, 2011, para. 178.

<sup>252</sup> UN General Assembly, Human Rights Council, A/67/292, *Report of the Special Rapporteur on the situation of human rights defenders*, August 10, 2012, para. 91.

<sup>253</sup> IACHR, *Second Report on the Situation of Human Rights in Peru*, OAS/Ser.L/V/II.106, Doc. 59 rev., June 2, 2000, para. 134.

<sup>254</sup> *Ibid.*, para. 136.

<sup>255</sup> IACHR, Press Release 19/14, *IACHR Takes Case involving Peru to the Inter-American Court*, Washington, DC, February 25, 2014.

improper interference." Furthermore, Principle 18 provides that "Lawyers shall not be identified with their clients or their clients causes as a result of discharging their functions," and Principle 20 establishes that "Lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal, or other legal or administrative authority." In turn, the International Bar Association said that "No lawyer shall suffer or be threatened with penal, civil, administrative, economic, or other sanctions or harassment by reason of his or her having legitimately advised or represented any client or client's cause."<sup>256</sup>

156. In addition, under Article 8 of the American Convention, everyone has the right to legal counsel of his or her own choosing or provided by the State. To ensure an effective and independent defense, lawyers must be certain that their defense work will not be identified with the cause they are defending. Otherwise this will lead them to refrain from undertaking the defense of certain cases, which may also negatively impact the client's right to have the lawyer of his or her choice.
157. States should refrain from reprisals against defense lawyers for the representation or assistance to their client or cause. In particular, the initiation of criminal proceedings against lawyers for the defense of a client can be an illegitimate pressure that may even affect his or her independence and undermine the client's right of defense.

### ***E. The Criminalization of Human Rights Defenders for the Causes they Promote***

158. The IACHR has been informed that some States have initiated criminal proceedings against human rights defenders as a result of the causes the defenders promote exercising their right to defend the rights recognized in the UN Declaration on Human Rights Defenders. Such is the case of human rights defenders of LGBT persons, as well as defenders of sexual and reproductive rights.
159. The misuse of criminal law affects the defenders of these rights in particular because in some countries the activities they promote may be prohibited, which exposes them to a greater risk of discrimination and retaliation and generates a deterrent and chilling effect in defending these rights. Additionally, the Commission notes that the initiation of baseless prosecutions in these cases is perceived as retaliation linked to their activities when they confront patriarchal attitudes, stereotypes, preconceptions and prevailing social perceptions, which contributes to perpetuating the marginalization of these groups of defenders, the people they defend and the universalization of these rights.
160. The Commission reiterates that the exercise of the defense of human rights implies the ability to freely and effectively promote and defend any right. Under Article 7 of the UN Declaration on Human Rights Defenders "Everyone has the right,

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<sup>256</sup> International Bar Association, IBA Standards for the Independence of the Legal Profession, 1990.

individually and in association with others, to develop and discuss new human rights ideas and principles and to advocate their acceptance."<sup>257</sup> In this regard, the activities of defense and promotion of human rights should not be discredited or criminalized in any way, but, on the contrary, States have the duty to respect and guarantee the right of human rights defenders to defend rights providing them with the necessary means to freely conduct their activities.

## **1. Misuse of Criminal Offenses to Stigmatize Defenders and Criminalize the Promotion and Protection of the Rights of LGBT Persons**

161. The Commission reiterates that the activities of promotion and protection of human rights must not be criminalized, and States must not prevent human rights defenders from enjoying their human rights or condone their stigmatization because of their work<sup>258</sup>. However, the Commission is aware that some criminal offenses, such as public incitement to crime, condoning crime, and conspiracy, have been used improperly by some States in order to criminalize the promotion and protection of the rights of lesbian, gay, bisexual, and transgender persons (LGBT)<sup>259</sup>.
162. In this regard, the Commission has received information which indicates that most of the Caribbean countries still criminalize sexual relations between consenting adults of the same sex.<sup>260</sup> The crimes contemplate penalties ranging from ten years of imprisonment—as is the case in Jamaica, Belize, Granada, St. Lucia, and Trinidad and Tobago, for example—to life imprisonment in Barbados and Guyana. In the context of public hearings on Guyana;<sup>261</sup> Jamaica and Belize;<sup>262</sup> and Trinidad and Tobago,<sup>263</sup> the IACHR received particularly concerning information regarding the criminalization, discrimination, harassment, and abuses suffered by LGBT persons in those countries. In this respect, the IACHR has expressed concern about the impact of legislation criminalizing consensual sex between adults of the same sex, even if those rules are not applied in practice, with respect to the rights to life, personal integrity, personal liberty, privacy, access to health, access to justice and other services.

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<sup>257</sup> UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, March 1999 Article 7.

<sup>258</sup> UN General Assembly, A/HRC/RES/22/6, Resolution adopted by the Human Rights Council, p. 4.

<sup>259</sup> The IACHR received no information on the criminalization of human rights defenders of intersex persons, hence the acronym "LGBT" will be used instead of "LGBTI."

<sup>260</sup> See the laws of Antigua and Barbuda; Barbados (Sexual Offences Act 1992); Belize (Penal Code); Dominica (Sexual Offences Act 1998); Grenada (Penal Code); Guyana (Penal Code); Jamaica (Offences against the Person Act); Saint Kitts and Nevis (Offences against the Person Act); Saint Lucia (Penal Code); Saint Vincent and the Grenadines (Penal Code); and Trinidad and Tobago (Sexual Offences Act 1986). *See also*, IACHR, Violence against LGBTI Persons (in Spanish only), OAS/Ser.L/V/II.rev.1 Doc. 36. November 12, 2015.

<sup>261</sup> IACHR, Press Release No. 83A/13, November 8, 2013.

<sup>262</sup> IACHR, Press Release No. 35A/14, May 13, 2014.

<sup>263</sup> IACHR, Press Release 131A/14, November 7, 2014.

163. Criminalization of same-sex sexual relations affects not only these above-mentioned rights but also that of the right to defend human rights<sup>264</sup>, constituting an obstacle to the groups and organizations that promote and defend the rights of these persons, since in some cases the right of association is prohibited under the argument that the object of these organizations is “illegal.”<sup>265</sup> The IACHR has said that those who defend the rights of LGBT persons should not be seen as “self-avowed criminals,” as this attribution stigmatizes them, negatively affects their right to defend the rights of LGBT persons, and ultimately lends to or facilitates the criminalization of their work.<sup>266</sup>
164. The Commission observes that restrictions imposed by other laws, outside of the criminal context, also negatively impact the right to defend human rights. For example, Belize and Trinidad and Tobago still have legislation that prohibits gay persons “or persons who have earned a living off of homosexuality” from entering the country. Additionally prohibited in Trinidad and Tobago is the entrance of persons “for homosexual purposes.” Civil society organizations report that these immigration restrictions can have a serious impact on the right of assembly of those who work in defending the rights of LGBT people.<sup>267</sup> As indicated by an advocate for LGBT rights in Trinidad and Tobago, this legislation makes “every meeting that [the organization, CAISO] organizes at its headquarters a potential infringement of the law.”<sup>268</sup>
165. In these countries, LGBT persons are considered as perpetrators of illegal activities and often the organizations that defend their rights are regarded as promoting illegal activities or “immoral behavior.”<sup>269</sup> On this basis, they are exposed to being threatened and persecuted, particularly by police officers, who have allegedly prohibited members of the LGBT community from meeting in certain public places, threatening to arbitrarily detain those who do not comply. As a consequence of this discrimination and stigmatization, this group of human rights defenders lives in constant fear of arrest, which hinders the legitimate exercise of their right to defend rights.<sup>270</sup>

In 2008, in Trinidad and Tobago an organization tried to register under the name of “National Pride: The Society of Trinidad and Tobago against Sexual Orientation Discrimination,” which provoked

<sup>264</sup> IACHR, Press Release 131A/14, Report on the 153rd Period of Sessions of the IACHR, November 7, 2014.

<sup>265</sup> IACHR, Second Report on the Situation of Human Rights Defenders in the Americas, OAS/Ser.L/V/II.Doc. 66, December 31, 2011, para. 334. See also AIDS-Free World and others, “The Unnatural Connexion: Creating societal conflict through legal tools. Laws criminalizing same sex sexual behaviors and identities and their human rights impact in Caribbean countries”, August 2010, p. 46.

<sup>266</sup> IACHR, Press Release 131A/14, November 7, 2014.

<sup>267</sup> IACHR, Press Release 131A/14, Report on the 153rd Period of Sessions of the IACHR, November 7, 2014.

<sup>268</sup> Testimony of Colin Robinson, CAISO, during the hearing of “Improper Use of Criminal Law to Criminalize Human Rights Defenders (On the Commission’s initiative)”, held at Headquarters on October 31, 2014.

<sup>269</sup> UN General Assembly, Human Rights Council, A/HRC/22/47/Add.1 Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, para. 91.

<sup>270</sup> *Ibidem*.

the General Registry's review of the application. This review included an interview in which the explicit exclusion of sexual orientation in the equal opportunities law, among other topics, was discussed. In this regard, one of the members of the organization recalled, "I was also questioned if the purpose of our organization was to promote anything illegal, and we could see a copy of the law of sexual offenses on top of our file."<sup>271</sup>

166. In addition, the Commission has noted a rise in negative discourse by public officials in different OAS Member States against lesbian, gay, trans, bisexual persons, and against those who defend their rights. These statements and actions by public officials –including some officials in charge of promoting human rights– have the effect of undermining the recognition of the rights of lesbian, gay, trans, bisexual and intersex persons, imperiling them and those who defend their rights, and hindering democratic debate<sup>272</sup>. For example:

Some organizations in Jamaica have reported that they fear their registration would have been or will be denied if they include within their purpose the promotion and protection of the rights of LGBT persons. This is because same-sex sexual conduct is outlawed in the Offences Against the Person Act,<sup>273</sup> and the organization's

<sup>271</sup> IACHR, 153rd Period of Sessions, Hearing on the Misuse of criminal law to criminalize human rights defenders, held at Headquarters on October 31, 2014. Testimony Colin Robinson, CAISO.

<sup>272</sup> IACHR, Press Release 37/13, [The IACHR Calls Member States to Ensure Respect of the Rights of LGBTI Persons by Public Officials](#), May 17, 2013.

<sup>273</sup> Jamaica, Offences Against the Person Act, §§ 76-77, 79:

*Unnatural Offences*

76. Whosoever shall be convicted of the abominable crime of buggery, committed either with mankind or with any animal, shall be liable to be imprisoned and kept to hard labour for a term not exceeding ten years.

77. Whosoever shall attempt to commit the said abominable crime, or shall be guilty of any assault with intent to commit the same, or of any indecent assault upon any male person, shall be guilty of a misdemeanour, and being convicted thereof, shall be liable to be imprisoned for a term not exceeding seven years, with or without hard labour.

*Outrages on Decency*

79. Any male person who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be guilty of a misdemeanour, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for a term not exceeding two years, with or without hard labour.

The Commission further notes that sections 29-33 of the [Sexual Offences Act of 2009](#) requires men convicted of the "abominable crime of buggery" to register as sex offenders.

registration may therefore be viewed as pursuing "immoral purposes."<sup>274</sup> In addition, senior officials have issued statements against organizations that defend and promote the rights of LGBT people. In 2004, the Department of Public Relations of the Police Federation reportedly issued a statement against a report by Human Rights Watch that condemned the homophobia of police and other government officials and threats against defenders of LGBT rights<sup>275</sup>, calling on the Minister of Justice to file sedition charges against the organization and other local groups, for insulting the government and the police forces<sup>276</sup>. Later, in 2009, a member of the Parliament of Jamaica, Ernest Smith, was quoted as saying that "homosexuals in Jamaica were so brazen that they have formed organizations," and he requested a ban on the activities of the organization Jamaica Forum for Lesbians and Gays Bisexual (J-FLAG) stating, "they should be outlawed, how can an organization be formed with the purpose of committing crimes be legitimized?"<sup>277</sup>

167. The Commission has indicated that these statements are intended to deter or hamper the work of human rights defenders. Therefore, it reminds States that public officials must refrain from making statements that stigmatize human rights defenders or that suggest that human rights organizations act improperly or illegally, merely because of engaging in their work to promote and protect human rights.<sup>278</sup> For this reason, the IACHR has urged OAS Member States to contribute decisively to the building of a climate of tolerance and respect in which all people, including lesbian, gay, trans, bisexual persons and those who defend their rights, can express their thoughts and opinions without fear of being attacked, punished, or stigmatized for doing so."<sup>279</sup>
168. The criminalization of defenders of LGBT persons does not occur only in the context of countries that criminalize consensual sex between persons of the same sex, but it can also be observed in other countries in the region where the defense of the rights of LGBT persons is not well-regarded. In these countries, criminal law

<sup>274</sup> J-Flag, *Human Rights Violations of Lesbian, Gay, Bisexual, and Transgender (LGBT) people in Jamaica: A Shadow Report, October 2011*, p. 20. The report also documents frequent violence in Jamaica against persons who are publically associated with "gay-rights organizations," including brutal beatings and murders of activists (p. 20). See also, National Anti-Discrimination Alliance of Jamaica, "*Mob Attack Leaves one Young Man in Critical Condition*," (Oct. 27, 2015); HRW, "*Jamaica: Combat Homophobia*" (July 18, 2012).

<sup>275</sup> Human Rights Watch, *Hated to Death* (Nov. 15, 2004). The report issued a series of recommendations, some of which pertain to providing protection for and the ending of State violence and discrimination against "peer educators" and human rights defender organizations working with LGBT persons and persons with HIV/AIDs.

<sup>276</sup> Human Rights Watch, *Letter to Prime Minister Golding, Letter Urging Jamaican Government to Protect Rights Defenders and Address Violence and Abuse Based on Sexual Orientation and HIV*, December 1, 2004.

<sup>277</sup> Human Rights Watch, *Letter to Prime Minister Golding*, February 19, 2009.

<sup>278</sup> IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas*, OAS/Ser.L/V/II.Doc. 66, December 31, 2011, para. 124.

<sup>279</sup> IACHR, Press Release 37/13, *The IACHR Calls Member States to Ensure Respect of the Rights of LGBTI Persons by Public Officials*, May 17, 2013.

is often misused to curb the development of the activities of promotion and defense.

In 2008, Jorge López Sologaitoa, director of the *Organización de Apoyo a una Sexualidad Integral* [Organization to Support an Integrated Sexuality] (OASIS), a human rights organization dedicated to the promotion and defense of the rights of LGBTI persons in Guatemala, was arrested and falsely charged with the attempted murder of a sex worker. After Jorge spent eight months under house arrest, the case against him was ruled inadmissible on the basis of insufficient evidence. OASIS interpreted this charge “as a continuation of the persecution that Jorge has suffered as a defender of LGBT rights,”<sup>280</sup> as prior to this incident, Jorge and other members of OASIS suffered threats and harassment due to their work. In fact, in February 2006, the IACHR granted precautionary measures for Jorge and twelve other members of OASIS, following an incident in which four police officers allegedly shot a communications assistant and a client of the organization.<sup>281</sup> Following this attack, Guatemala’s Human Rights Ombudsman found the State responsible for human rights violations against the two victims; however, in 2009 Jorge was arrested and newly charged with criminal acts after denouncing the Public Prosecutor’s Office for irregularities in the case, as it had not yet come to trial. These charges were dropped in September 2009, when the presiding judge found them to be baseless.<sup>282</sup>

## 2. Misuse of Criminal Law to Criminalize the Promotion and Protection of Sexual and Reproductive Rights

169. The Commission has learned of cases of criminalization against human rights defenders of sexual and reproductive rights in retaliation for their work, especially for challenging social stereotypes. In this regard, in its 2011 Report, the Commission noted that the criminalization of women human rights defenders who promote therapeutic abortions is a pattern in various countries of the Americas, where abortion is prohibited in all circumstances.<sup>283</sup>
170. In this sense, the social stigma associated with the work related to sexuality has forced defenders to constantly assess whether or not they can discuss sexual and reproductive rights. According to information received by the IACHR, they are

<sup>280</sup> Peace Brigades International (PBI), *Criminalisation of Human Rights Defenders*, p. 10.

<sup>281</sup> IACHR, *Precautionary Measures 2006*, para. 29.

<sup>282</sup> PBI, “Sexual minority rights in Guatemala: Struggling for recognition and justice.”

<sup>283</sup> IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas*, OAS/Ser.L/V/II.Doc.66, December 31, 2011, para. 287.



faced with incidents of criminalization, they are exposed to physical attacks, and their work is stigmatized, affecting their credibility and preventing them from promoting the protection of other rights. In many cases, the aforementioned stigma leads to self-censorship.<sup>284</sup>

During its 147th Period of Sessions, the IACHR was informed that in Colombia Monica Roa, then Director of Programs for the organization Women's Link Worldwide, along with 1280 other women filed a *tutela* action (an action for protection) against the Attorney General and two of his delegates, for the violation of the right to information and the consequent impairment of their sexual and reproductive rights, as a result of the dissemination of false, incomplete and distorted information on sex education, contraception and abortion. Following this action, the Office of the Delegate Attorney for childhood, adolescence and family, Ilva Myriam Hoyos, filed a criminal complaint for defamation against human rights defender Monica Roa. In the conciliation hearing prior to the beginning of the criminal proceedings, Delegate Attorney Hoyos demanded, as a condition for dropping the charges, that Roa retract all criticism of her work as a public servant in the *tutela* action and reproduced in the media.<sup>285</sup> By means of judgment T-627 of August 10, 2012, the Constitutional Court decided the lawsuit in favor of the 1280 women, and ordered the Attorney General and Delegates to rectify the statements made as public servants for violating the right to information on reproductive matters, and affecting other sexual and reproductive rights. Despite this decision, the criminal proceedings for defamation continued against Monica Roa.<sup>286</sup>

171. The UN Rapporteur on human rights defenders expressed concern over the difficulties faced by defenders resulting from legislation that aims to protect public morals. In this regard, the Rapporteur indicated that associations promoting sexual and reproductive rights have faced restrictions for having handed out information about abortion and referred women to appropriate medical facilities. As detailed in her report, in many cases, lawsuits have been brought by individuals, organizations, and State actors, claiming that such activities are against the law. The UN Rapporteur noted that such situations have also been observed in countries where sexual and reproductive rights are guaranteed by the national legal system. In this regard, she emphasized that "sexual and reproductive rights

<sup>284</sup> Women Human Rights Defenders Coalition, Global Report on the Situation of Human Rights Defenders, January 2012, p. 76.

<sup>285</sup> Women's Link Worldwide, Avanza denuncia penal de Procuradora Delegada contra Mónica Roa. Fiscalía cita a Audiencia de Conciliación, August 16, 2012.

<sup>286</sup> IACHR, 147 Period of Sessions, hearing on the status of sexual and reproductive rights in Colombia. See also: Documento de las peticionarias y los peticionarios (Spanish only); American Bar Association's response to the questionnaire for the preparation of the report on criminalization of human rights defenders through the misuse of criminal law, September 2014.



defenders thus play a significant role in ensuring respect for women's human rights. Such activities should not be subject to criminal sanctions (...) Judicial harassment against sexual and reproductive rights defenders should not be tolerated, and judges and prosecutors have a key role in this regard."<sup>287</sup>

Regarding Nicaragua, during its 140th Period of Sessions, the Commission received information on the situation of Ana María Pizarro, Juanita Jiménez, Lorna Norori, Luisa Molina Arguello, Marta María Blandón, Martha Munguía, Mayra Sirias, Violeta Delgado and Yamileth Mejía, nine human rights defenders who were prosecuted in Nicaragua in 2007 for the crime of incitement to commit the crime of abortion and illicit association to commit a crime. According to the information available, the criminal cases were brought because the nine women human rights defenders had accompanied a nine-year-old girl through the process of getting an abortion; the girl was pregnant as a result of being raped. A number of organizations expressed concern over the fact that criminal cases had been brought against the women human rights defenders because of their activities to defend and promote a woman's human rights. According to the organization's reports, on March 24, 2011 it was made public that the criminal cases against the nine women had been dismissed.<sup>288</sup>

172. The Commission maintains that the exercise of the right to defend human rights cannot be subjected to geographical restrictions, and implies the possibility to promote and defend freely and effectively any rights whose acceptance is unquestioned; the rights and freedoms contained in the Declaration of Defenders itself; and new rights or components of rights whose formulation is still being discussed.<sup>289</sup>

## ***F. The subjection to Distorted and Unreasonably Lengthy Criminal Proceedings and False Allegations and Accusations Based on Grave Criminal Offenses***

173. The Commission has received information verifying that in practice many of the criminal proceedings that are initiated against human rights defenders are slow - or are accelerated - in an unreasonable manner in order to hinder their work at a

<sup>287</sup> UN General Assembly, Human Rights Council, A/67/292, *Report of the Special Rapporteur on the situation of human rights defenders*, August 10, 2012, paras 36-38.

<sup>288</sup> IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas*, OAS/Ser.L/V/II.Doc. 66, December 31, 2011, para. 287.

<sup>289</sup> IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas*, OAS/Ser.L/V/II.Doc. 66, December 31, 2011, para. 16.

crucial time for the causes they defend and to intimidate them personally, which also has an intimidating effect that extends to other human rights defenders that could instill fear of suffering the same fate if they continue their work in defense of human rights. Sometimes the delay in criminal proceedings is due to hearings being constantly postponed as a result of the absence of the accusing attorneys, the judge, or because the investigative body requests more time to investigate. In other cases, human rights defenders are linked to proceedings for a long time, which are subsequently dismissed.<sup>290</sup>

174. For example, some organizations have expressed their concern before the Commission over the speed with which arrest warrants and other protective measures to the detriment of human rights defenders are issued.<sup>291</sup> In contrast, the processes opened to investigate acts of harassment committed against defenders, are often undertaken without celerity and procedural efficiency.<sup>292</sup> For example:

In the case of Honduras, in the Bajo Aguán region, some civil society organizations reported a strong contrast between the pace of judicial proceedings in open cases against defenders considering the prevailing impunity in the country and in particular in cases of attacks against human rights defenders. They indicated that 162 organized *campesinos* or farmers have been prosecuted for their activities of defense and promotion of human rights, and more than 80 have been temporarily imprisoned. They also pointed out several infringements on due process guarantees that were reported in October 2011 to the IACHR, including pending processes against *campesinos* dating from 1996 to 1997, where there are cases with no trial to-date, and others, where the *campesinos* remain in prison after serving a sentence of imprisonment for the stipulated offense.<sup>293</sup>

175. Unjustified criminal proceedings impose personal and material burdens that harass, intimidate, and diminish the work of defenders. These charges are aggravated by the unreasonable prolongation of criminal proceedings. In this regard, the Commission reiterates that in accordance with Article XVIII of the American Declaration, every person may resort to the courts to ensure respect for his legal rights. There should likewise have available a simple, brief procedure

<sup>290</sup> PBI, La criminalización de la protesta social continúa. Acciones penales en contra de defensores y defensoras de derechos humanos: tendencias, patrones e impactos preocupantes, (Spanish only), p. 3.

<sup>291</sup> APRODEV, CIDSE and others, Criminalización de los y las defensores de derechos humanos en América Latina. Una aproximación desde organizaciones internacionales y redes europeas (Spanish only), June 2012, p. 7.

<sup>292</sup> IACHR, 153 Period of Sessions, hearing on misuse of criminal law to criminalize human rights defenders, on October 31, 2014.

<sup>293</sup> APRODEV, CIDSE and others, Criminalización de los y las defensores de derechos humanos en América Latina. Una aproximación desde organizaciones internacionales y redes europeas (Spanish only), June 2012, p. 7.

whereby the courts offers protection from authority acts which are contrary to fundamental constitutional rights.<sup>294</sup>

176. Also, in accordance with the first of the guarantees stipulated in Article 8 of the American Convention, everyone has the right to a hearing, with due guarantees and within a reasonable time by a competent, independent, and impartial tribunal established before the law, in the determination of any criminal charge against him, or for the determination of his rights and obligations of civil, labor, fiscal, or any other nature. With regard to the reasonableness of the duration, the jurisprudence of the Inter-American Court has indicated that it is necessary to take into account four elements to determine the fairness of such a period: a) the complexity of the matter; b) the procedural activity of the interested party; c) the conduct of judicial authorities; and d) the impairment to the legal situation of the person involved in the proceedings.<sup>295</sup>
177. With regard to the final element, the Inter-American Court has determined that, in order to establish the reasonableness of the duration, the affectation of such duration on the juridical situation of the person must be taken into account, among other elements including the subject matter of the controversy. In this regard, the Inter-American Court has recognized in its jurisprudence that if the passage of time has a relevant impact on the legal situation of the individual, it will be necessary that the process be more diligent so that the case is resolved briefly. This involves not only the consideration of the "legal" involvement but also the damage that the passage of time causes to the victim.
178. The misuse of the criminal law against human rights defenders generates among them a number of negative impacts at a personal and collective level, affecting their physical health and generating effects at the family and social level. In particular, it has a negative impact on the defense of human rights. The defender who is prosecuted must invest his or her time and resources on his or her defense and loses the ability to attend his or her work or the organization's. This sum of factors in turn creates an intimidating and chilling effect on the community of human rights defenders who, for fear of reprisals, may refrain from doing their work of promoting and protecting human rights<sup>296</sup>, which impacts society in general.
179. In this regard, the Commission believes the condition of being a human rights defender is particularly important to determine whether a process has respected the guarantee of a reasonable timeframe, given the affectation that occurs over time in the legal situation of the defender – since, as noted before, prolonged criminal proceedings particularly affect the defender and generates a deterrent effect on the exercise of the right to defend human rights.

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<sup>294</sup> American Declaration of the Rights and Duties of Man, Article XVIII.

<sup>295</sup> I/A Court H.R., *Case Kawas Fernández v. Honduras*. Merits, Reparations and Costs. Judgment of April 3, 2009. Series C No. 196, para. 112.

<sup>296</sup> *Ibid.*, para. 153.

180. Furthermore, the Commission has learned that defenders not only have been subjected to lengthy criminal proceedings based on criminal offenses contrary to the standards of international law but, in some cases, have also been charged with crimes like robbery, murder, and kidnapping based on false and fabricated evidence without the defenders having engaged in unlawful or guilty conduct.<sup>297</sup> The Commission is also aware of the accusations levied against defenders of offenses that are only applicable to public officials.<sup>298</sup> Sometimes justice operators adapt these offenses so that they can be applied to acts they want penalized and are able to justify the detention of human rights defenders. In some cases, these charges lead to convictions when investigations are not conducted independently and impartially, providing full evidential value to conflicting testimony and false means of proof.

In 2010 in Mexico, José Ramón Aniceto Gómez and Pascual Agustín Cruz, two Nahua indigenous authorities dedicated to promoting the right of access to water in the community of Atla, municipality of Pahuatlán, were detained and subjected to criminal proceedings. Their arrest was based on a complaint of theft brought by a member of the local cacique group, who said that on October 27, 2009, the two defenders with someone else made him stop his vehicle, violently threw him out of it, and immediately thereafter fled in the car. The complainant presented two alleged eyewitnesses to support his version of events. Following that complaint on July 12, 2010, the defenders were convicted and sentenced to seven years' imprisonment and a fine for alleged theft.<sup>299</sup> On November 23, 2010, the State Superior Court rejected an appeal, but reduced the sentence to 6 years and 10 months. According to Amnesty International, their arrest, prosecution, and conviction occurred in retaliation for their work in defense of the right to water in their community. In particular, they found that five days before the alleged theft of the car, the son of the complainant, Abraham Aparicio, attacked the engineer responsible for the canalization of water in Atla with a machete, and several people, including Pascual Agustín Cruz, managed to disarm him. Also according to Amnesty International, in the process neither the public prosecutor nor the judicial police performed their duty to conduct an impartial and independent investigation to determine the facts. There was no attempt to interview multiple witnesses or to check the official

<sup>297</sup> IACHR, 153 Period of Sessions, hearing on misuse of criminal law to criminalize human rights defenders, on October 31, 2014.

<sup>298</sup> Response by the Network Against Violence Against Women (REDNOVI) questionnaire for the preparation of the report on criminalization of human rights defenders through the misuse of criminal law, September 2014; Response from Martha Inés Palomino Socorro Lozano questionnaire for the preparation of the report on criminalization of human rights defenders through the misuse of criminal law, September 2014. In this regard it has been noted that penal types of encroachment of functions in have been used in Mexico and embezzlement by appropriation in Colombia which are crimes of exclusive application to public servants.

<sup>299</sup> Amnesty International, *Mexico: Prisoners of Conscience released*, November 9, 2012.

minutes of the attack of Abraham Aparicio against those carrying the work of canalization of water, police records were not checked about the operation to recover and safeguard the abandoned vehicle, nor was there an attempt to determine its whereabouts. The officials did not visit the place of the alleged offense, nor tried to interview other witnesses and assess the credibility of the witnesses proposed by the complainant. In addition, the process was conducted in Spanish, without the accused having access to a lawyer who spoke their language or an interpreter, even though the Constitution grants them this right. In turn, they also noted that their right to an adequate defense and due process was not respected, as both the prosecution and the judge reportedly ordered processing without further evidence than the statement of the alleged victim<sup>300</sup>. According to information received by the Commission, in November 2012, the Supreme Court of Justice (SCJ) ordered their immediate release on the grounds that the criminal proceedings against them had a number of irregularities that affected the rights of defense, for insufficient evidence, lack of impartiality of the prosecution witnesses, and for not to having an interpreter and translator who spoke their native language.<sup>301</sup>

181. The Commission reiterates that, as emphasized in its *Second Report on the Situation of Human Rights Defenders in the Americas*: no human rights defender may be subject to a criminal proceeding indefinitely; such a situation would infringe on the guarantee of a reasonable time period. This guarantee, in addition to being a basic element for the right to a trial in accordance with the rules of due process, is especially essential to prevent unwarranted criminal proceedings from preventing defenders from doing their work.
182. The Commission considers that a timely judicial decision contributes to the public and complete disclosure of truth, making it less likely for defenders subject to proceedings to be stigmatized by these, and also making it less likely that the community of human rights defenders will be hampered from continuing to report human rights violations<sup>302</sup>. That is why States should take all necessary measures to prevent that State investigations lead to unjust or unfounded judgments against people who legitimately claim the respect and protection of human rights.

<sup>300</sup> Amnesty International, *Mexico: Documentation of the case of José Ramón Aniceto Gómez and Pascual Agustín Cruz – Prisoners of conscience*, May 25, 2012.

<sup>301</sup> Center Prodh response to the questionnaire for the preparation of the report on criminalization of human rights defenders through the misuse of criminal law, September 2014; El Heraldo de Mexico, *Ordena SCJN libertad de indígenas de Pahuatlán* (Spanish only), November 29, 2012.

<sup>302</sup> IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas*, OAS/Ser.L/V/II.Doc. 66, December 31, 2011, para. 111.

## G. *Illegal and Arbitrary Detentions*

183. The Commission has noted that it is very common for mass detentions of defenders to take place, especially in contexts of social protest. Many times when carrying out such arbitrary detentions, the persons affected are released within a few hours, but in other cases they remain preventively deprived of their liberty for unreasonable periods of time.
184. The Commission has received information on the detention of defenders in several instances, including without a court warrant; with a warrant lacking sufficient and specific information allowing the identification of the person to be captured; with a blank warrant to be filled during or after capture; or with a valid warrant that is executed incorrectly.<sup>303</sup> Detentions are used as a mechanism to keep defenders from doing their work or to hold them in custody at crucial times in the defense of their causes.<sup>304</sup> According to information received by the Commission, in some countries of the region, attorneys that assist defenders detained in the context of demonstrations have also been subjected to detentions in order to deter them from providing legal assistance to protesters.<sup>305</sup> For instance:

Regarding Haiti, the Commission learned about the alleged arbitrary detention of human rights defender and lawyer André Michel, which occurred on October 22, 2013<sup>306</sup> in Port au Prince. According to publicly available information, André Michel was arrested after 6pm with an invalid arrest warrant, thereby contravening Article 24 of the Haitian Constitution. According to his lawyer Mario Joseph, in early 2013 a warrant for his arrest was issued, but it was invalid because the Bar of Haiti was not notified, a condition required to initiate criminal proceedings against lawyers in accordance with Haitian law. However, this warrant was used to justify the detention of André. According to his lawyer, his detention constitutes a reprisal for his work of uncovering corruption in the government of

<sup>303</sup> Human Rights First, Baseless Prosecutions of Human Rights Defenders in Colombia In the Dock and Under the Gun, February 2009, p.35.

<sup>304</sup> IACHR, Second Report on the Situation of Human Rights Defenders in the Americas, OAS/Ser.L/V/II.Doc. 66, December 31, 2011, para. 112.

<sup>305</sup> Amnesty International, "They use a strategy of fear": Protecting the right to protest in Brazil, June 2014, p.13.

<sup>306</sup> Response of the Human Rights Clinic of the Faculty of Law of the University Western New England to the consultation questionnaire to States and civil society to prepare the report on criminalization of human rights defenders through the misuse of criminal law, p.2.

President Martelly<sup>307</sup> as well as complaints against the President's wife and son of the President in the investigation of the alleged commission of crimes of corruption.<sup>308</sup>

185. Another trend the IACHR has been informed of is the misuse of arrest warrants, which remain in effect for years but are not executed. These dormant warrants are often resuscitated in "strategic moments, typically when those with warrants become more politically active."<sup>309</sup> When the warrants are used in this way, it creates a deterrent effect on the activity of defense of human rights defenders because human rights defenders could stop performing their activities for fear of exposure to arrests.

According to information presented before the Commission, as of December 2013, at least 10 people belonging to the 12 communities Kaqchikeles of San Juan Sacatepequez, Guatemala, who were involved in processes in defense of territory and natural resources against the installation of a cement project in that region, had unexecuted warrants for their arrest, including two orders that had not been executed or dismissed since 2009. According to representatives of the community, for that reason those affected felt "prisoners in their own territories."<sup>310</sup>

186. In addition, the Commission has learned that sometimes arrests without warrants against human rights defenders are justified by the flagrancy<sup>311</sup> of crimes established in ambiguous terms that directly criminalize the right to protest and freedom of expression, or through the false accusation of having committed serious criminal offenses. Such arrests may include the transfer to jails<sup>312</sup> or police stations, and sometimes involve the transfer to other cities or places far from where human rights defenders live or work, which limits their legal support<sup>313</sup>.

<sup>307</sup> Institute for Justice & Democracy in Haiti, Human Rights groups denounce illegal arrest of Haitian Lawyer André Michel, October 24, 2013.

<sup>308</sup> Al Jazeera, Haiti arrests key anti-corruption lawyer, October 23, 2013.

<sup>309</sup> PBI, Peace Brigades International Guatemala Project, Second Bulletin 2013-No.30, p.10.

<sup>310</sup> *Ibidem*.

<sup>311</sup> DPLF, Criminalización de los Defensores de Derechos Humanos y de la Protesta Social en México, p. 18.

<sup>312</sup> Red INCLO (International Network of Civil Liberties Organizations), Represión y criminalización de la protesta en el mundo, "Recuperen las calles" (Spanish only), October 2013, p. 8.

<sup>313</sup> Corporación Acción Humana por la Convivencia y la Paz del Nordeste Antioqueño CAHUCOPANA, Informe sobre la situación de los derechos humanos en la región del Nordeste Antioqueño Colombiano (Spanish only), 2013.

In Peru, through Administrative Resolution 096-2012-CE-PJ of the Executive Council of the Judicial Power of May 31, 2012, ordered that all cases related to social protests in the region of Cusco and Cajamarca be transferred to district courts of Ica and Chiclayo.<sup>314</sup> Such decision was allegedly motivated in preventing social tensions from affecting the administration of justice. Civil society organizations informed the Commission that this had a negative impact on defendants with no financial resources, given that for many it is difficult to travel those long distances and ensure the presence of their lawyers, a situation which affects their right of defense and access to justice.<sup>315</sup>

187. A detention is arbitrary and unlawful when done outside of the grounds and the formalities prescribed by law, when it is executed without observing the procedures that the law prescribes, and when there has been an abuse of the powers of arrest, that is, when the arrest is made for purposes other than those that the law prescribes and requires. The IACHR has also held that a detention for improper purposes is in itself a sort of sentence without trial, or an unlawful penalty that violates the guarantee against imposition of punishment without benefit of trial. The Inter-American Commission has established that the term "arbitrary" is synonymous with irregular, abusive, or contrary to law.<sup>316</sup>

The IACHR through its Annual Reports has documented the existence of arbitrary detentions in Cuba. In this regard, in its Annual Report of 2013 regarding Cuba, the Commission stated that it "has continued to receive information regarding that the Government had continued its tactic of carrying out arbitrary detentions of short duration, carried out without a warrant against political opponents, human rights defenders and independent journalists, who are often held uncommunicated for periods ranging from hours to days, usually in police stations. The IACHR has referred to this as a tactic of political repression on the basis of systematic arrests of several hours or days, threats and other forms of harassment against opposition activists. In addition, the IACHR has received information on the application of the offense of "social danger" against defenders.<sup>317</sup> In this regard, in 2014 the Working Group on Arbitrary Detention showed the application of this figure

<sup>314</sup> Administrative Resolution 096-2012-CE-PJ of the Executive Council of the Judicial Power of Peru.

<sup>315</sup> Frontline Defenders, *Environmental Rights Defenders at Risk in Peru*, June 2014, page 2.

<sup>316</sup> IACHR, *Report No. 35/08, Case 12.019, Admissibility and Merits, Antonio Ferreira Braga, Brazil*, July 18, 2008, para.68.

<sup>317</sup> Response International Group for Corporate Social Responsibility in Cuba to the questionnaire for the preparation of the report on criminalization of human rights defenders through the misuse of criminal law, September 2014.



of "pre-criminal social danger" contained in Articles 78 to 84 of the Cuban Penal Code to punish those who had not committed crimes but had displayed a dangerous behavior for society that makes them likely to commit crimes, which would apply to sanction habitual drunkards and drug addicts but also those who express dissenting views.<sup>318</sup>

188. The Commission notes that the deprivation of the right to liberty of a person must be based on concrete facts justifying the arrest. The facts at issue must be criminal and cannot be based on the potential risk that a person may commit a crime.<sup>319</sup>
189. In accordance with inter-American standards, regardless of the legality of a detention, it may be considered arbitrary and therefore contrary to Article 7.3 of the Convention, if the following criteria is not met: i) the purpose of measures that deprive or restrict a person's liberty is compatible with the Convention; ii) the measures adopted are appropriate for complying with the intended purpose; iii) the measures are necessary, in the sense that they are absolutely indispensable for achieving the intended purpose and that no other measure less onerous exists, in relation to the right involved, to achieve the intended purpose; and iv) the measures are strictly proportionate.<sup>320</sup> In this respect the IACHR believes that the detention of human rights defenders is arbitrary when it results from the exercise of the right to defend rights and freedoms contained in the American Convention.<sup>321</sup>
190. In this sense, both the American Declaration and the American Convention outline guarantees and obligations held by States to prevent arbitrary and illegal arrests. The first instrument establishes in its Article XXV the right to protection against arbitrary arrest: "no person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law." It also indicates that "every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay or, otherwise, to be released."
191. Article 7 of the American Convention recognizes the right to personal liberty, which contains two regulations, one general and one specific. The general one can be found in Article 7.1 which states that every person has the right to personal

<sup>318</sup> Working Group on Arbitrary Detention, Opinions adopted by the Working Group on Arbitrary Detention at its 69th session (April 22 to May 1, 2014), A/HRC/WGAD/2014/9, para.5.

<sup>319</sup> *Ibid*, para. 24.

<sup>320</sup> I/A Court H.R., *Case Vélez Loor v. Panama*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 23, 2010. Series C No. 218, para. 166.

<sup>321</sup> The United Nations Working Group on Arbitrary Detention Nations considers a deprivation of liberty to be arbitrary when it results from the exercise of rights and freedoms proclaimed in articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights, and also in respect of States parties, in articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights. See Human Rights Council, Working Group on Arbitrary Detention, Opinions adopted by the Working Group on Arbitrary Detention at its 65th session (November 15 to 23, 2012), A/HRC/WGAD/2012/56, No 56/20120 (Bolivarian Republic of Venezuela), para.2 b).

liberty and security. In turn, the specific part consists of a series of guarantees that protect the right not to be deprived of liberty unlawfully (Article 7.2) or arbitrarily (Article 7.3), to ascertain the reasons for the arrest and charges against the detainee (Article 7.4), to judicial review of the detention (Article 7.5) and to challenge the legality of the detention.

192. In light of the jurisprudence of the inter-American system, when an arrest occurs, the motives and reasons for it must be informed, which is a mechanism to avoid illegal or arbitrary detentions from the moment of detention, and ensure the right of defense of the individual. In turn, the agent who carries out the detention must inform in simple language, free of jargon, the essential facts and legal grounds on which the detention is based.<sup>322</sup> Moreover, after the detention, immediate control of its legitimacy must be done through the provision of a judge.<sup>323</sup> According to the jurisprudence of the Inter-American Court in cases of arrest *in fraganti*, appearance before a judge without delay is particularly relevant to avoid arbitrariness or illegality of the measure.<sup>324</sup>
193. The Commission considers that arbitrary arrests are serious because they place human rights defenders in a vulnerable situation, from which emerges a real and imminent risk that other rights be violated to his or her detriment.<sup>325</sup> In turn, the systematic and consistent practice of attacks on freedom of the members of an organization, within a climate of hostility to their work, may imply a violation of freedom of association.<sup>326</sup>
194. By virtue of the foregoing, the Commission considers that States must cease the use of arbitrary detentions as a means of punishment or retaliation against human rights defenders.

## ***H. Use of Precautionary Measures in Order to Criminalize the Work of Human Rights Defenders***

195. The Commission has noted that the initiation of criminal proceedings against defenders implies, in some cases, issuing preventive measures such as remand, bail, the obligation to report or appear periodically before a court, and/or a ban on leaving the country. The Commission has also been informed that some countries have issued measures such as the inability to attend certain meetings or places. The Commission is aware that in some cases members of the judiciary order precautionary measures without addressing the procedural purposes for which

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<sup>322</sup> I/A Court H.R., *Case of Cabrera García and Montiel Flores v. Mexico*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 26, 2010. Series C No.220, para. 105.

<sup>323</sup> *Ibidem*.

<sup>324</sup> I/A Court H.R., *López Álvarez v. Honduras*. Judgment of February 1, 2006, Series C No. 141, para. 88.

<sup>325</sup> I/A Court H.R., *Case of Valle Jaramillo et al v. Colombia*. Merits, Reparations and Costs. Judgment of November 27, 2008. Series C No. 192, para. 69.

<sup>326</sup> IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas*, OAS/Ser.L/V/II.Doc. 66, December 31, 2011, para. 111.

they are designed, to be implemented rather as a mechanism to prevent the work of defenders by their detention or creating other obstacles that interfere with the activities of defense they perform.<sup>327</sup>

196. On other occasions, preventive measures are the result of the initiation of criminal proceedings as a result of the misapplication of offenses that do not conform with the principle of legality, in which legitimate behaviors in the defense of human rights are framed within the criminal offenses, and sometimes the above mentioned precautionary measures are issued in the framework of these proceedings.
197. The Commission considers that when a criminal process begins and the judge orders a precautionary measure against the accused, it must be ensured that such measure is designed to secure the legitimate purposes of the process. In turn, in addition to meeting the international standards contained in the American Convention and the American Declaration, when the justice operator orders a preventive measure, consideration should be paid to the negative effects it could have on the legitimate right to defend human rights. These standards are particularly relevant in the case of defenders, because if they are not observed, not only are the rights of the person who is subject to the preventive measure affected, but this in turn has an impact on the complaints and claims made by victims of human rights violations as well as society at large, given the role that human rights defenders have in the consolidation of democracy and the rule of law.
198. In this regard, it has been noted that precautionary measures can come into tension with the presumption of innocence when they constitute a punishment that is imposed before there is a final judgment. The presumption of innocence means that, as a general rule, the accused should face criminal proceedings in freedom, which is why the Commission has considered that one fundamental standard is that so long as the risk of escaping justice or the danger of hindering the investigation can reasonably be avoided by subjecting the accused to a less onerous measure than the one requested by the prosecutor, the court should invariably prefer the former, imposing it either individually or in conjunction with others.<sup>328</sup>

## 1. Pretrial Detention

199. The requirements outlined above are particularly relevant in the case of the most severe criminal precautionary measure: prison or pretrial detention. The IACHR has consistently reiterated that it is a non-punitive, preventive measure, which constitutes the most severe measure that can be applied to a person accused of committing a crime. Therefore, according to the guarantees enshrined in the

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<sup>327</sup> IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas*, OAS/Ser.L/V/II.Doc. 66, December 31, 2011, para. 112.

<sup>328</sup> IACHR, *Report on the use of pretrial detention in the Americas*, OAS/Ser.L/V/II.Doc.46/13, adopted on December 30, 2013, para. 225.

American Convention and the American Declaration, its application must be an exception, limited by the principles of legality, presumption of innocence, necessity, and proportionality that are essential in a democratic society.<sup>329</sup> As such, its application may only be ordered when there is a risk of flight or destruction of evidence.<sup>330</sup>

200. However, the Commission has been informed that in the case of defenders who are the victims of criminalization processes, prosecutors often accentuate the accusations in order to charge them for more serious crimes with a sentence of imprisonment. This is done in order to justify the application of pretrial detention and thus deprive defenders of freedom from the beginning of the process. For example, the Commission has received information regarding defenders who have been charged with political crimes or crimes against national security, which are serious criminal offenses punishable with imprisonment.<sup>331</sup> Additionally, vague or ambiguous definitions of criminal offenses are used, which make it difficult to perceive what behaviors are punishable, thereby contributing to the margin of discretion with which justice operators prosecute human rights defenders, such as those involved in social protests. In this regard, civil society organizations informed the Commission that defenders are frequently accused of crimes that are not susceptible of bail or more serious crimes or offenses to facilitate the imposition of pretrial detentions.<sup>332</sup> It was also reported that in some cases, the media exert pressure on justice operators when determining the imposition of pretrial detention.<sup>333</sup>
201. Regarding pretrial detention, the jurisprudence of the inter-American system has maintained that no one shall be subjected to arbitrary arrest or imprisonment, prohibiting the arrest or imprisonment by methods that, although legal in practice, are unreasonable or lacking in proportionality.<sup>334</sup> The general principle set forth in Article 7.2 of the American Convention is that, while criminal responsibility is

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<sup>329</sup> IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas*, OAS/Ser.L/V/II.Doc.66, December 31, 2011, para. 116.

<sup>330</sup> IACHR, *Report on the Use of Pretrial Detention in the Americas*, OAS/Ser.L /V/II.Doc. 46/13, adopted on December 30, 2013, para. 143.

<sup>331</sup> DPLF, *Criminalization of Human Rights Defenders and Social Protest in Mexico*, p. 18.

<sup>332</sup> IACHR, 153 Period of Sessions, hearing on misuse of criminal law to criminalize defenders of human rights, on October 31, 2014.

<sup>333</sup> Institute of Legal Defense, *La prisión preventiva en el Perú: ¿medida cautelar o pena anticipada?* (Spanish only), p. 103; DPLF, *Insufficient judicial independence, distorted pretrial detention: the cases of Argentina, Colombia, Ecuador, and Peru* (Spanish only), p. 168 (referring to disciplinary proceedings initiated against judge Hugo Mollinedo, member of the Judicial District of Amazonas, after revoking pretrial detention against four indigenous persons prosecuted for the alleged murder of 12 policemen at the headquarters of PetroPerú, and instead applied the appearance with restrictions for the accused. He maintained that "there are sufficient grounds for supposing that, consciously or unconsciously justice operators consider the press as an extralegal factor in making their decisions to avoid the questioning of their work. Also, a review of La Libertad, Arequipa and Lima newspapers shows a lack of rigor in the processing of the crimes and the trial, which leads to, in many cases, the violation of the presumption of innocence of the accused. There is an open challenge to the judge who does not to impose pretrial detention or criminal penalties. The decision or judgment is not discussed: it presupposes the existence of an irregularity and acts contrary to the law").

<sup>334</sup> I/A Court H.R., *Suarez Rosero v. Ecuador*. Merits. Judgment of November 12, 1997. Series C No. 35 para. 43.

being determined, freedom is always the rule, and the limitation or restriction of freedom is always the exception.

202. There are also other characteristics to which arrest orders or the application of pretrial detention must be adjusted in order to comply with inter-American instruments. First, the application of any such measure must be precautionary and not punitive. In other words, it must be aimed at legitimate purposes and reasonably related to the ongoing criminal proceedings. Such measures cannot become early penalties or have general or special preventive purposes attributable to them<sup>335</sup>. Second, these measures must be based on sufficient evidence. This means that there must be sufficient elements to reasonably assume that the person being prosecuted has participated in the illegal act under investigation. The suspicion must be based on specific facts and not on mere assumptions or abstract intuitions. Thirdly, with regard to pretrial detention, this measure must be subject to periodic review. Pre-trial detention should not be prolonged when the reasons for its adoption do not subsist, which must be based on the need to ensure that the detainee will not impede the development of the investigations and will not evade justice.<sup>336</sup> Otherwise, imprisonment would become arbitrary<sup>337</sup> and would equate, factually-speaking, to an early penalty,<sup>338</sup> thereby contradicting universally-recognized principles of law.<sup>339</sup>
203. As for the length of pretrial detention, the Inter-American Court has indicated that Article 7.5 of the Convention itself "imposes temporal limits on the duration of pre-trial detention and, consequently, on the State's power to protect the purpose of the proceedings by using this type of precautionary measure."<sup>340</sup> In response to

<sup>335</sup> I/A Court H.R., *Suarez Rosero v. Ecuador*. Merits. Judgment of November 12, 1997. Series C No. 35 para. 77.

<sup>336</sup> I/A Court H.R., *Suarez Rosero v. Ecuador*. Judgment of November 12, 1997. Series C No. 35, para. 77. Subsequently, in other cases as: I/A Court H.R., *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 21, 2007. Series C No. 170, para. 93; *Servellón García et al v. Honduras*. Judgment of September 21, 2006. Series C No. 152, para. 90; *Case Palamara Iribarne vs. Chile*. Judgment of November 22, 2005. Series C No. 135, para. 198; *Case Acosta Calderón v. Ecuador*. Judgment of June 24, 2005. Series C No. 129, para. 111; I/A Court H.R., *Case of Tibi v. Ecuador*. Judgment of September 7, 2004. Series C No. 114, para. 180.

<sup>337</sup> UN Human Rights Committee, CCPR/C/103/D/1547/2007, Release No. 1547/2007, Munarbek Torobekov v. Kyrgyzstan, decision of 27 October 2011, para. 6.3; United Nations Human Rights Committee, CCPR/C/99/D/1369/2005, Release No. 1369/2005, Felix Kulov, decision of July 26, 2010, para. 8.3. In the same sense, I/A Court H.R., *Case of Bayarri v. Argentina*. Preliminary Objection, Merits, Reparations and Costs. Judgment of October 30, 2008. Series C No. 187, para. 74.

<sup>338</sup> I/A Court H.R., *Case López Álvarez v. Honduras*. Judgment of February 1, 2006. Series C No. 141, para. 69; *Case Acosta Calderón v. Ecuador*. Judgment of June 24, 2005. Series C No. 129, para. 111; *Case Tibi v. Ecuador*. Judgment of September 7, 2004. Series C No. 114, para. 180; *Case "Juvenile Reeducation Institute" v. Paraguay*. Judgment of September 2, 2004. Series C No. 112, para. 229; *Case Suárez Rosero v. Ecuador*. Judgment of November 12, 1997. Series C No. 35, para. 77. Similarly, IACHR, Report No. 86/09, Case 12.553, Merits, José, Jorge and Dante Peirano Basso, Uruguay, August 6, 2009, para. 133; Report No. 2/97, Case 11.205, Merits, Jorge Luis Bronstein and others, Argentina, March 11, 1997, para. 12; *Third Report on the Situation of Human Rights in Paraguay*, OAS/Ser.L/VII.110. Doc. 52, adopted on March 9, 2001. Cap. IV, para. 34.

<sup>339</sup> I/A Court H.R., *Case "Juvenile Reeducation Institute" v. Paraguay*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 2, 2004. Series C No. 112, paragraph 229.

<sup>340</sup> I/A Court H.R., *Case of Barreto Leiva v. Venezuela* Merits, Reparations and Costs. Judgment of November 17, 2009. Series C No. 206, para. 119.

this provision, any person shall have the right to be tried within a reasonable time or to be released, without prejudice to the continuation of the proceedings against him. The Inter-American Court has also stated that this period cannot be established in the abstract, and in the analysis of the extension of police custody, the factors for determining reasonable time should be evaluated in a stricter and limited way due to the underlying deprivation of liberty.<sup>341</sup> In addition, the IACHR, the Working Group on Arbitrary Detention, the Special Rapporteurs of the United Nations, and the Office of the UN High Commissioner for Human Rights have all considered that continued and indefinite detention of individuals without due respect for the right to due process is arbitrary and constitutes a clear violation of international law.<sup>342</sup>

204. Both the Commission and the Inter-American Court have pointed out that pretrial detention should only be used in criminal proceedings for trials to safeguard the effects of the process, this is why the personal characteristics of the alleged perpetrator or the severity or type crime he is charged with should not be a justification<sup>343</sup>, nor preventive purposes based on the dangerous character of the accused, the possibility of committing crimes in the future or the social impact of the event could be used as a justification.<sup>344</sup> If the State does not justify and demonstrate in a clear and reasoned manner, in each individual case, the existence of valid requirements for pretrial detention, this would constitute a violation of the presumption of innocence.<sup>345</sup>
205. In response to the recommendations already made by the IACHR, "Pretrial detention shall not be ordered for minor criminal offenses, when there is only a mere suspicion that the suspect is criminally liable, when other alternative measures are available that can guarantee that the accused will appear for trial, for reasons of "public concern" or any other abstract legal concept, or in view of a possible long-term conviction"<sup>346</sup>. The Commission has indicated that the initiation of baseless criminal actions may also violate the rights to personal integrity, judicial protection and guarantees, as well as the honor and dignity of human rights defenders, without prejudice to the damage caused by the undue restriction on the legitimate exercise of rights – such as personal liberty, freedom of thought

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<sup>341</sup> IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas*, OAS/Ser.L/V/II.Doc. 66, December 31, 2011, para. 168.

<sup>342</sup> IACHR, *UN Working Group on Arbitrary Detention, UN Rapporteur on Torture, UN Rapporteur on Human Rights and Counter-Terrorism, and UN Rapporteur on Health Reiterate Need to End the Indefinite Detention of Individuals at Guantánamo Naval Base in Light of Current Human Rights Crisis*, May 1, 2013 and the Working Group on Arbitrary Detention, Opinions adopted by the Working Group on Arbitrary Detention at its 66th session (April 29 – May 3, 2013), A/HRC/WGAD/2013/10, July 25, 2013.

<sup>343</sup> I/A Court H.R., *Case Bayarri v. Argentina*. Preliminary Objection, Merits, Reparations and Costs. Judgment of October 30, 2008. Series C No. 187, para. 74; I/A Court H.R., *Case López Álvarez v. Honduras*. Judgment of February 1, 2006. Series C No. 141, para. 69.

<sup>344</sup> IACHR, Report No. 86/09 Case 12,553 Merits, Jorge, José and Dante Peirano Basso, Oriental Republic of Uruguay, August 6, 2009, para. 84.

<sup>345</sup> IACHR, *Report on the Use of Pretrial Detention in the Americas*, OAS/Ser.L/V/II.Doc. 46/13, adopted on December 30, 2013, para. 137.

<sup>346</sup> IACHR, *Report on the Use of Pretrial Detention in the Americas*, OAS/Ser.L/V/II.Doc. 46/13, adopted on December 30, 2013, Recommendations, C.12.

and expression and the right of assembly – through the use of the criminal system.<sup>347</sup>

## 2. The Provision of an Economic Bond and Other Precautionary Measures

206. As previously noted, the exceptional nature of pretrial detention means concretely that States make use of other precautionary measures not involving the deprivation of liberty of the accused for the duration of the criminal proceedings.<sup>348</sup> In this sense, the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas prepared by the IACHR indicate that States "shall promote the participation of society and the family in such a way as to complement the intervention by the State, and shall also provide the necessary and appropriate resources to ensure their availability and effectiveness."<sup>349</sup>
207. However, the Commission has received information regarding the illegal use of other preventive measures within criminal proceedings in order to affect the work of human rights defenders. Among the measures used, the Commission has identified the imposition of bonds, the prohibition to protest or to meet or visit certain places, the obligation to report in court on a periodic basis, and the ban on leaving the country. Often the imposition of these measures, beyond protecting the aims of process, results in greater restrictions that culminate in interfering with the right of defenders to defend human rights. Among the examples reported:

The Commission has received information indicating that in Venezuela a large number of people were arrested by State security agents in the context of the demonstrations that took place in the country during the first months of 2014.<sup>350</sup> A number of protesters detained had custodial measures or alternative measures issued under criminal proceedings initiated against them. Among the alternative measures were include the need to report to the court every 30 or 15 days, the ban on leaving the country or city where they live and the prohibition to participate in demonstrations.<sup>351</sup> In this regard, civil society organizations have noted that while the ban

<sup>347</sup> Ibid., para. 82.

<sup>348</sup> Ibid., para. 223.

<sup>349</sup> IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, adopted by the IACHR by Resolution 1/08 at its 131st regular session, held from March 3-14, 2008, Principle III.4.

<sup>350</sup> Ultimas Noticias, *Desde el 12-F han sido detenidas 2.626 personas por hechos violentos* (Spanish only), April 25, 2014; El Tiempo, *Fiscal dice hay 145 denuncias de violaciones de derechos humanos* (Spanish only), April 25, 2014. According to figures provided by the General public prosecutor, from February 12 to April 23, 2014, there were around 2,626 arrests of protesters.

<sup>351</sup> El Nacional, *Alfredo Romero publica lista actualizada de detenidos por protestas* (Spanish only), February 22, 2014.



on attending certain meetings is among the alternative measures referred to in Article 242 of the Criminal Procedure Code, "these [meetings] must be related to the alleged risk of escape or obstruction of the investigation and must, as indicated by the same article, be determined, therefore the imposition of a general measure prohibiting the exercise of a right is illegal and unconstitutional."<sup>352</sup>

208. Furthermore, the Commission has identified that the imposition of bonds in criminal proceedings has been used as a means of repression against certain groups of defenders that, due to their situation of economic vulnerability, cannot pay them.<sup>353</sup> This situation particularly affects indigenous and community leaders who do not have the resources to pay the high amounts required. When the amount of bail is so high that it cannot be paid by the detainee<sup>354</sup>, human rights defenders have no choice but to accept restrictions on their freedom, thus affecting their work and their organizations.
209. The Commission considers that States must ensure that bail mechanisms observe principles of material equality and that they do not constitute a form of discrimination against people who lack the financial capacity to pay those amounts. Additionally, in cases in which the inability of the accused to pay has been established, courts must use other methods to ensure appearance at trial that do not entail deprivation of liberty.<sup>355</sup>
210. The Commission has also learned of the use of precautionary measures such as the ban to participate in meetings or public demonstrations as a strategy to prevent human rights defenders from involving themselves in public demonstrations in which social causes are promoted or public allegations of corruption are made against governments. In this regard, the IACHR reminds States that freedom of assembly is a fundamental tool in the defense of human rights, essential for engaging in political and social criticism of authorities' activities, as well as for establishing positions and plans of action with regard to human rights.<sup>356</sup> In this sense, the right to hold public demonstrations will be protected by the American Convention as long as this right is exercised peacefully and without arms.<sup>357</sup>

<sup>352</sup> Centre for Human Rights at the Catholic University Andres Bello, *Hasta que se demuestre lo contrario, Violaciones del debido proceso a personas enjuiciadas por manifestar* (Spanish only), April 2015.

<sup>353</sup> IACHR, *Report on the Use of Pretrial Detention in the Americas*, OAS/Ser.L/V/II.Doc.46/13, adopted on December 30, 2013, para. 232.

<sup>354</sup> Response from the Committee of Relatives of Detained and Missing Persons in Mexico "Alzando Voces" Michoacan to the questionnaire for the preparation of the report on criminalization of human rights defenders through the misuse of criminal law, September 2014.

<sup>355</sup> IACHR, *Report on the use of pretrial detention in the Americas*, OAS/Ser.L/V/II.Doc. 46/13, adopted on December 30, 2013, para. 235.

<sup>356</sup> IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas*, OAS/Ser.L/V/II.Doc. 66, December 31, 2011, para. 129.

<sup>357</sup> Ibidem.



The Commission was aware of the criminal proceedings against three executive members of the Comité Ambientalista del Valle de Siria in Honduras, an organization working on the defense of human rights and the environment, who have focused much of their work on the impacts of mining in the country. According to the information provided to the IACHR, three of the directors of the organization, along with 14 other environmentalists, were reportedly accused of "obstructing the implementation of a forest management plan", punishable with 4-6 years of prison, based on events that occurred in April 7, 2010 when around 600 members of the municipality prevented the cutting of trees that protect the micro basin "Quebrada Guayabo" which supplies drinking water to six communities. On July 5, 2011, the accused had the first hearing and alternative measures were issued including banning the defendants from visiting the hill they defend. Subsequently, on February 20, 2013, the 17 environmentalists were acquitted of the charges against them.<sup>358</sup>

211. The Commission notes that alternative or substitute detention measures should take into account international human rights standards<sup>359</sup>. It is important to highlight that these alternatives to imprisonment should aim to secure the process and therefore should only proceed when there is a risk of flight or obstruction of the investigation, and should not be used as a barrier to prevent or restrict the exercise of promotion and protection of human rights by the defenders. Similarly, since some of these measures also restrict the enjoyment of other rights, such as the right to freedom of movement, they should also be imposed in accordance with the principles of legality, necessity and proportionality.<sup>360</sup>
212. States should ensure that the precautionary measures that are imposed on defenders who have been subject to criminal proceedings comply with the standards of the American Convention and the American Declaration, and that when implementing them, special consideration should be made of the negative effects their imposition could have in their advocacy work within the framework of the right to defend the rights and the right to obtain justice of victims they represent.

<sup>358</sup> Peace Brigades International response to the questionnaire for the preparation of the report on criminalization of human rights defenders through the misuse of criminal law, September 2014.

<sup>359</sup> IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, adopted by the IACHR by Resolution 1/08 at its 131st regular session, held from 3 to March 14, 2008, Principle III.4.

<sup>360</sup> IACHR, *Report on the use of pretrial detention in the Americas*, OAS/Ser.L/V/II.Doc. 46/13, adopted on December 30, 2013, para. 230.

CHAPTER 4  
EFFECTS OF CRIMINALIZATION  
ON HUMAN RIGHTS DEFENDERS



## EFFECTS OF CRIMINALIZATION ON HUMAN RIGHTS DEFENDERS

213. The Commission notes that the different forms in which defenders are criminalized generate negative impacts both individually and collectively. Moreover, as noted above, the subjection to criminal proceedings or the mere threat of being subjected to criminal prosecution has a chilling and intimidating effect among the defenders, who for fear of reprisals may stop working on their defense of human rights. The Commission has been informed of a number of effects that have been observed in defenders who have been criminalized, which can be lengthy and even permanent.

### *A. Physical Effects and Impacts on Personal Integrity*

214. As indicated by the IACHR, criminal proceedings to which defenders are subjected by the authorities without justification, have a negative impact at the individual and collective level. The individual effects may include fear<sup>361</sup>, anxiety, insecurity, frustration, and impotence<sup>362</sup> as well as stress, anxiety, depression, insomnia, isolation, and insecurity of the person subject to trial. These effects are generated not only following the initiation of criminal proceedings, but may also occur following the threat of possible arrest, as even the mere issuance of an arrest warrant, although not executed, generates among defenders fear of being arrested and causes uncertainty and anxiety thereby affecting their physical and emotional health. For instance:

In report No. 43/96 (Merits), Case 11. 430 (Mexico), the Commission concluded that the 15 preliminary inquiries and 9 criminal indictments against the same person, that resulted in his ultimately being acquitted in all these cases, subjected the victim to the constant annoyance of having to defend himself before the courts, the degradation of being detained on several occasions, and the humiliation of being the target of attacks by military authorities in the media.<sup>363</sup> In this case, the Commission stated that "the accumulation of several unfounded criminal cases against a human

<sup>361</sup> Response from the Center Fray Julian Garces to the questionnaire for the preparation of the report on criminalization of human rights defenders through the misuse of criminal law, September 2014.

<sup>362</sup> IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas*, OAS/Ser.L/V/II.Doc. 66, December 31, 2011, para. 79.

<sup>363</sup> IACHR, Report No. 43/96, Case 11.430, Merits, Jose Francisco Gallardo, Mexico, October 15, 1996, para. 79.

rights defender may lead to a violation of the right to personal integrity when the harassment caused by initiation of criminal proceedings affects the normal development of daily life and causes great imbalances and perturbation to the person subject to legal proceedings and his family, whose severity is verified on the constant uncertainty about their future."<sup>364</sup> Consequently, it declared that the State had violated the moral and psychological integrity protected by Article 5.1 of the Convention.

215. As for its physical effects, criminalization may harm the health of the defenders and their families. Unjustified criminal proceedings against human rights defenders can create a stressful situation that, in cases where defenders are in detention, is compounded with the uncertainty about whether they will be released and when or if they will ever see their families.<sup>365</sup>

In 2011 at the Faculty of Medical Sciences of the University of Cuenca, the Movimiento por la Salud de los Pueblos y Acción Ecológica presented a report on the state of health of eight human rights defenders subjected to criminal proceedings as a result of their work as community leaders in the Parish of Cochapata, Nabón Canton, Ecuador. The report was conducted by three doctors and the methodology included the assessment of social and environmental health through semi-structured interviews with community leaders, physical health through their medical histories and physical examinations and mental health, for which their psychological history was evaluated (semi-structured interview). Psychological reagents were also conducted by using the Goldberg test that values mental suffering, depression, and anxiety, as well as the mini mental test that assesses the cognitive status of the patient and can detect dementia or delirium.<sup>366</sup> The report concluded that seven of the patients apparently suffered severe mental anguish and anxiety, as well as possible depression. It was also recorded that one patient had severe depression and three had suicidal thoughts. Furthermore, the report concluded that the examined patients found themselves living in inhuman socio-environmental conditions, in a logic of nomadism and isolation, which impaired their physical and mental health. In turn, all of them experienced terror against the

<sup>364</sup> IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas*, OAS/Ser.L/V/II.Doc. 66, December 31, 2011, para. 120.

<sup>365</sup> IACHR, *UN Working Group on Arbitrary Detention, UN Rapporteur on Torture, UN Rapporteur on Human Rights and Counter-Terrorism, and UN Rapporteur on Health Reiterate Need to End the Indefinite Detention of Individuals at Guantánamo Naval Base in Light of Current Human Rights Crisis*, May 1, 2013.

<sup>366</sup> University of Cuenca. Faculty of Medical Sciences. Informe del Estado de Salud de los Compañeros Criminalizados en la Parroquia Cochapata, p. 2.

existence of detention orders, as well as exclusive and traumatic targeting at the prospect of capture, loss of sleep, starvation and apathy.<sup>367</sup> Regarding physical health, some patients displayed chronic gastritis, anemia syndrome, uncontrolled hypertension, among others. It came to light that the eight defenders named on the medical report were pardoned in 2011 by the National Assembly of Ecuador on the basis of a report by the Justice Commission.<sup>368</sup>

216. The Commission reiterates that the right to humane treatment, which includes physical, mental, and moral integrity, is one of the most fundamental values in a democratic society.<sup>369</sup> Therefore, States should take all necessary measures to ensure that human rights defenders can carry out their activities free from acts that endanger their personal safety.

## **B. Impact on Family Life**

217. In addition to the effects generated by the misuse of criminal law in the physical and mental health of the defenders, the IACHR is aware of the negative impact that this misuse has on families of human rights defenders. The processes of misuse of criminal law negatively impact the interpersonal relationships of human rights defenders, since in many cases the persons subjected to criminal proceedings are forced to separate from their families and change their place of residence and even to leave their community, city, or country, and therefore alter their life plans, abandoning their daily work.<sup>370</sup> Additionally, when the defender is detained, the family dynamic and daily life is changed, and the family members are forced to use all their efforts to secure the release of the criminalized defender.<sup>371</sup>
218. Moreover, criminalization tends to particularly affect children who are next of kin of the criminalized individuals. The experience of having a relative subjected to criminal proceedings, especially when they have been present at the time of their capture can instill fear in children.<sup>372</sup> Further, the stigma the families of the

<sup>367</sup> University of Cuenca. Faculty of Medical Sciences. Informe del Estado de Salud de los Compañeros Criminalizados en la Parroquia Cochapata, p. 2.

<sup>368</sup> Inredh, [Amnistía para los 7 defensores criminalizados en Nabón](#) (Spanish only), December 6, 2011.

<sup>369</sup> I/A Court H.R., *Case of Montero Aranguren et al (Reten de Catia) v. Venezuela*. Preliminary Exception, Merits, Reparations and Costs. Judgment of July 5, 2006. Series C No. 150, para. 85.

<sup>370</sup> Response from the Centro de Derechos Humanos y Asesoría a Pueblos Indígenas, A.C. to the questionnaire for the preparation of the report on criminalization of human rights defenders through the misuse of criminal law, September 2014.

<sup>371</sup> Prodh Response to the questionnaire for the preparation of the report on criminalization of human rights defenders through the misuse of criminal law, September 2014.

<sup>372</sup> The thematic report "Scenarios for the criminalization of human rights defenders and of nature in Ecuador" issued by the Ombudsman of Ecuador makes reference to the effects that the misuse of criminal law could have on children. It states that "in the case of the residents of San Pablo Campus Amali, the report of the Director of the UDT-T INNFA, filed January 24, 2007, by memorandum No. 031-CL.GDA.2007, the children are the most affected emotionally by the military presence: "in this struggle between the parties the most affected are the children, who have expressed fear at the military officers in the area; for all that they are

criminalized person have to endure, affects them and their relationships in a particular way.

The INREDH, CNDH, and Clínica Ambiental organizations performed a psychosocial report on the impact caused by the criminal proceedings against the "10 Luluncoto" in Ecuador. On March 3, 2012, before the Plurinational March for Water, Life and Dignity of Peoples, seven men and three women were arrested in an apartment in Luluncoto a southern suburb of the capital, in an operation called "Red Sun." Nine of the defendants were remanded to prison and one was granted substitute measures for being pregnant. After nine months in prison, seven men gained their freedom through habeas corpus, while the other two women remained in custody. In February 2013, the Third Criminal Court of Pichincha sentenced them to a year in prison for attempted terrorism, a prison term that equaled the time spent by most defenders in remand.<sup>373</sup> The psycho-social report developed by the organizations shows the following, among the social impacts as a result of criminal proceedings against them: "a) the detainees' way of life stopped abruptly - their jobs, studies, family life, and projects; b) their families suffered a financial detriment as a result of the travel expenses related to the visits to prison, in addition to the legal costs they incurred on; c) their family relations have been deeply affected. The experience of this process has been traumatic: detention, raids, and the subsequent impacts and stigma." Further, they indicated that the psychosocial impacts include: "a) psychological impacts directly associated with moments of arrest, prosecution, and raids or searches. Many family members have symptoms of post-traumatic stress; b) In this specific case, several family members showed a generalized anxiety state, withdrawal, tendency to isolation, severe mental pain, insomnia, apathy, anorexia; c) In addition, relatives of the detainees have a major concern facing the stigma generated as a result of the management of the judicial process and the problems that the detainees would face for their social and professional reintegration."<sup>374</sup>

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doing against their parents and relatives, an example of this is the imprisonment suffered by the community leaders who oppose this construction, imprisonments and abuses that have taken place in presence of their children, and that somehow caused a trauma in children of the community." Ombudsman of Ecuador, thematic report, Scenarios Criminalization of Human Rights Defenders and Nature in Ecuador: Challenges for a Constitutional State of Rights, p. 50.

<sup>373</sup> Civil society organizations have pointed out that "Judges involved in cases deciding on human rights defenders of the environment have taken the habit of dictating sentences by matching the period in which the defendants have kept custody; so it was with the 10 Luluncoto, who were kept in prison for a year, and students of the Central Técnico sentenced to 21 days in prison." See, INREDH - Ecuador/10 meses de prisión para defensor de Intag (Spanish only), February 15, 2015.

<sup>374</sup> INREDH response to the questionnaire for the preparation of the report on criminalization of human rights defenders through the misuse of the criminal law, October 2014.

219. The IACHR recalls that the American Convention in Article 11.2 recognizes the right of everyone to be protected against arbitrary or unlawful interference with his family, which is part of the right to protection of families and children, and is also expressly recognized by Articles 12.1 of the Universal Declaration of Human Rights, V of the American Declaration of the Rights and Duties of Man and 17 of the International Covenant on Civil and Political Rights<sup>375</sup>. In light of the foregoing, the IACHR urges States to respect and ensure the rights of the family and the rights of children, to refrain from criminalizing human rights defenders in retaliation for their work, and to ensure that third parties do not misuse the punitive power of the State.

### ***C. Social Effects***

220. Criminalization may also have social effects by affecting structures, leadership, the ability to function as a group, and collective symbols.<sup>376</sup> In this sense, when criminalization affects persons which play significant roles in a society, town or community, such as social and community leaders and indigenous authorities, it has a very negative impact on the collective because not only is the accused person affected, but also the society in which he or she plays a role, as that person is prevented from exercising his or her position of representation, leadership, or authority. In this sense:

The Commission has received information on women defenders in the region of Cajamarca in Peru, who said that after being criminalized they have lost social support, limiting their participation in the protests. One of the defenders said that after her arrest, her role in the movement started being questioned. She stressed that this led to fears for the safety of her family, especially that of her father, who is a community leader opposing the Conga mining project.<sup>377</sup>

221. Misuse of criminal law can also generate community division, because when a defender is criminalized, it generates mistrust and collective insecurity, as well as a climate of fear, threats, accusations, and social ostracism. For instance:

In its Merits Report No. 176/10, the Commission examined a series of allegations of human rights violations under the American

<sup>375</sup> I/A Court H.R., Advisory Opinion OC-17/2002 of August 28, 2002, requested by the Inter-American Commission on Human Rights, para. 71.

<sup>376</sup> Ibid., p.27.

<sup>377</sup> Response of the Latin American Union of Women (ULAM) to the questionnaire for the preparation of the report on criminalization of human rights defenders through the misuse of the criminal law, October 2014.



Convention to the detriment of several traditional authorities, leaders and activists of the indigenous Mapuche people in Chile. The petition claimed that several leaders had been prosecuted and convicted for alleged terrorist acts on the basis of an ambiguous and general criminal law, which was discriminatory in its application, given the ethnicity of the victims and their quality of Lonkos, leaders and activists of the Mapuche indigenous peoples. The IACHR found that the facts alleged were in violation of Articles 8, 9, 13, 23 and 24 of the American Convention, in relation to the obligations established in Articles 1.1 and 2 thereof, and highlighted the impact of the aforementioned violations in the cultural integrity of the Mapuche. The Commission noted that for the indigenous Mapuche people, the criminal prosecution of their traditional authorities Lonkos and Werken was a violation with implications on the collective social fabric. Traditionally, the Lonkos Mapuche lead the decision-making processes in political, economic, military and administrative affairs of the community, and often lead religious and spiritual processes, being repositories of ancient wisdom, and preside ceremonies as important as the guillatun (prayers). The Werken, meanwhile, are confidants and messengers of the Lonkos and factors of alliance between families and communities. Both the Lonkos and the Werken, make up the leadership of the Mapuche community, and are therefore key players in their socio-cultural structure. According to the IACHR, it was not only an act of the judicial authorities who prevented the fulfillment of cultural responsibilities of indigenous authorities, obstructing the realization of government and ritual functions, among others, but also an affront to the dignity of the Mapuche people as a whole.<sup>378</sup>

222. In its decision on this matter, the Inter-American Court also found that the use of stereotypes and prejudices on the reasoning of the judgments against the indigenous authorities, constituted a violation of Article 24 of the American Convention. The Court also concluded that the imposition of disproportionate penalties on the effective exercise of political rights in the case of leaders was not only an individual violation, but also affected members of the Mapuche people they represented.<sup>379</sup>
223. Subjecting a person to unfounded criminal proceedings also generates stigma against the criminalized person and her or his family. This can result in the person

<sup>378</sup> The Commission also concluded that it was unacceptable to use anti-terrorism legislation as a tool to silence the complaints, demonstrations, and social protests of the indigenous Mapuche people, all of which constituted forms of protected speech under the American Convention and were oriented towards the recovery of their ancestral lands. IACHR, Report No. 176/10, Case 12,576, 12,611 and 12,612, Fund Catriman Segundo Aniceto Norin, Juan Patricio Marineo Saravia, Victor Ancalaf Llaupe and Others, Chile, November 5, 2010, paras. 212 and 218.

<sup>379</sup> I/A Court H.R., *Case Norin Catrimán and others (leaders, members and activist Mapuche Indigenous People) v. Chile*. Merits, Reparations and Costs. Judgment of May 29, 2014. Series C No. 279, paras. 228, 230, 383-385.

and his or her family being viewed with suspicion in their communities, and as bearers of an accusation which cannot be challenged. This stigma leads to the criminalization of their conduct, which also causes rejection in their social environment. Furthermore, in the case of women defenders, it has been noted that the criminalization not only has an inhibitory effect on defense activities carried out, but also increases and exacerbates existing social inequalities.<sup>380</sup>

224. The stigmatization generated by the processes of criminalization makes it difficult for the victim to find support in regards to the legal and personal effects of her situation as often the person is isolated from her social network and even her family. In some cases, relatives or people close to the victim prefer to distance themselves because the criminalization also runs against people who show solidarity and support for victims of criminalization. In turn, the stigma attached to the criminalization may expose defenders to violence.<sup>381</sup> In its 2006 Report, the IACHR identified statements made by State officials that had put human rights defenders and their organizations in a situation of risk and vulnerability as alarming.<sup>382</sup>
225. In the same sense, the UN Special Rapporteur for Human Rights Defenders, indicated that the stigma makes human rights defenders vulnerable to attacks of aggression against them and even murder, especially by non-State actors<sup>383</sup>, because the population perceives and qualifies them as troublemakers<sup>384</sup>. Finally, another social effect of criminalization is that the community is forced to accept a severe impact on their livelihoods and forced acculturation for fear of suffering the same consequences if they refuse.<sup>385</sup>
226. The Commission considers it essential that States publicly and unequivocally recognize the fundamental role played by human rights defenders, thus legitimizing their work. Launching recognition campaigns is a particularly important action to take adopt within the communities where human rights defenders work to eliminate the stigma and reduce the risk that weighs on them as a result of the processes of criminalization to which they have been subjected.

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<sup>380</sup> Response from the Latin American Mining Monitoring Programme to the questionnaire for the preparation of report on criminalization of human rights defenders through the misuse of criminal law, September 2014.

<sup>381</sup> Carlsen, Laura, Mexico's False Dilemma: Human Rights or Security, 10 Nw. U. J. Int'l Hum. Rts. 146, 2.

<sup>382</sup> IACHR, *Report on the Situation of Human Rights Defenders in the Americas*, OAS/Ser.L/V/II.124.Doc.5 rev. 1 March 7, 2006, para. 334.

<sup>383</sup> UN, Assembly Nations, Human Rights Council, A/HRC/25/55, Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, December 23, 2013, para. 58.

<sup>384</sup> UN, General Assembly of the United Nations, Human Rights Council, A/HRC/13/22, Report of the Special Rapporteur Margaret Sekaggya on the situation of human rights defenders, December 30, 2009, paras.32-33.

<sup>385</sup> Carlos Martin Beristain, Manual on psychosocial perspective in the investigation of human rights, Hegoa-CEJIL, 2010, p. 28.

## ***D. Long-Term Effects on the Defense of Human Rights and Other Consequences***

227. The main impact of criminalization through the misuse of criminal law is on the right to defend human rights. Criminalization not only affects the criminally prosecuted defender, who must invest time and resources in his procedural defense, neglecting his work or organization, but also generates an intimidating and chilling effect on other defenders who for fear retaliation may refrain from doing their work of promoting and protecting human rights.<sup>386</sup> This affects society as a whole, given that the defenders promote complaints, present claims and make demands at the social and collective level that contribute to the realization of the rule of law and democracy by combating impunity.<sup>387</sup>
228. The Commission has received information indicating that criminalization contributes to the dissolution and weakening of organizations.<sup>388</sup> Particularly, it has been reported that "in many cases it manages to destabilize the foundations of organizations that often are afraid to perform acts of protest again, in particular because of the threat of authorities to link them with criminal offenses, or to reinvigorate criminal processes."<sup>389</sup> For instance:

Within the procedure of provisional measures before the Inter-American Court of Human Rights in the matter of Liliana Ortega et al regarding Venezuela, the representatives referred to the existence of "a campaign of acts of criminalization against COFAVIC which intensifies each time this non-governmental organization plays a relevant role before the inter-American system or when it acquires public visibility denouncing cases of human rights violations. As a result of this intimidation, [the organization] has been obliged to drastically reduce its public appearances and the movements of its members."<sup>390</sup>

229. This situation is worse in countries where there is a context of impunity.<sup>391</sup> Regarding the case of Luna López against Honduras before the Inter-American

<sup>386</sup> I/A Court H.R., *Case Kawas Fernández v. Honduras*. Merits, Reparations and Costs. Judgment of April 3, 2009. Series C No. 196, para. 153.

<sup>387</sup> IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas*, OAS/Ser.L/V/II.Doc. 66, December 31, 2011, para. 21.

<sup>388</sup> CEDHU response to the questionnaire for the preparation of the report on criminalization of human rights defenders through the misuse of criminal law, in September 2014.

<sup>389</sup> Response from the Human Rights Coordinator of Paraguay (CODEHUPY) to the questionnaire for the preparation of the report on criminalization of human rights defenders of through the misuse of criminal law, September 2014.

<sup>390</sup> I/A Court H.R., Order of July 9, 2009, Provisional Measures regarding Venezuela, Matter of Liliana Ortega and others, p. 8.

<sup>391</sup> I/A Court H.R., *Case Cantoral Huamaní and García Santa Cruz v. Peru* Preliminary Objection, Merits, Reparations and Costs. Judgment of July 10, 2007. Series C No. 167, para. 146.

Court, the Commission indicated that since the threats and the subsequent murder of Mr. Luna López took place in light of his work on environmental protection as a public servant, this would have a negative impact over other human rights defenders due to the fear caused, which could directly reduce the chances of such persons exercising their right to defend human rights through complaints.<sup>392</sup> This example also demonstrates the potential impact:

Regarding Haiti, on November 27, 2013, the Commission granted precautionary measures in favor of Patrice Florvilus and members of the organization "Défense des Opprimés" to protect their life and personal integrity, due to a series of threats, harassment and persecution allegedly in retaliation for their work to defend human rights in Haiti.<sup>393</sup> In the context of this measure, the applicants stated that the harassment and smear campaigns undertaken by the authorities adversely affected their work. In particular, they noted that campaigns of harassment and police surveillance against Patrice Florvilus and his organization had a severe impact on them and their families. Following August 11, 2013, when four men identified as police officers visited the offices and threatened the staff, all staff became afraid for their lives and their families. In that sense, as claimed by the applicants, the threats had such an effect on the organization that staff were focused on safeguarding their lives and that of their colleagues, and not on continuing the fight for the oppressed.<sup>394</sup>

230. The organs of the inter-American system have indicated that reprisals against human rights defenders have a multiplier effect that goes beyond the person of the defender. When an assault is committed in reprisal for a defender's actions, it produces a chilling effect on those defending similar causes<sup>395</sup>, which directly affects the protection and promotion of human rights.
231. In its *Second Report on the situation of defenders of human rights in the Americas*, the Commission stated that "it is understandable that the mere existence of the criminal law invoked for five years [...] [against the person denouncing human rights violations] would deter others from filing human rights complaints and from even uttering any opinion critical of the authorities' conduct. This is because of the ever looming threat of being subjected to criminal prosecution that could result in

<sup>392</sup> I/A Court H.R., *Case Luna Lopez v. Honduras*. Judgment of October 10, 2013. Series C No 269, para.111.

<sup>393</sup> IACHR resolution 10/2013 precautionary measure No. 304-13 in respect of the Republic of Haiti (Spanish and French only), November 27, 2013.

<sup>394</sup> Response of the Human Rights Clinic of the Faculty of Law of the University Western New England to the consultation questionnaire to States and civil society to prepare the report on criminalization of human rights defenders through the misuse of criminal law, p.2.

<sup>395</sup> IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas*, OAS/Ser.L/V/II.Doc. 66, December 31, 2011, para. 25.

severe penalties and fines."<sup>396</sup> This was also emphasized by the IACHR regarding the criminalization of social protest stating that such criminalization has "a dissuading effect on those sectors of society that express their points of view or criticisms of government actions as a way of influencing the decision-making processes and State policies that directly affect them."<sup>397</sup>

232. According to the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, criminalization "could not only risk supporting illegitimate action against peaceful human rights advocacy, but also confuse the fundamental understanding that each and every individual is entitled to enjoy and claim all their human rights."<sup>398</sup>
233. In this regard, the Commission considers that States have a particular duty to protect and provide effective and adequate guarantees to human rights defenders so that they can freely carry out their activities, avoiding actions that limit or hinder their work because their work is a positive and complementary contribution to the efforts of the State by virtue of its role as guarantor of the rights of persons under its jurisdiction. In this line, the prevalence of human rights in a democratic State is based largely on the respect and freedom that is given to the work of defenders.<sup>399</sup>

## ***E. Economic Effects***

234. Criminalization produces negative economic effects on human rights defenders given that economic costs are a direct result of a judicial process. The defender has to, first of all, hire a private attorney, or use public defenders if he cannot afford his own lawyer. Additionally, on occasion, the defender may be forced to pay bail to regain his or her freedom. As the IACHR has been informed, some defenders have to rely on loans to pay bonds or choose to remain in custody. These two circumstances affect the economic situation of the defenders and their families.
235. Defenders must also incur in mobilization expenses to face judicial proceedings.<sup>400</sup> Hearings are often postponed implying that the defenders must repeatedly travel

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<sup>396</sup> IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas*, OAS/Ser.L/V/II.Doc. 66, December 31, 2011, para. 96.

<sup>397</sup> IACHR, *Annual Report 2005* Rapporteur for Freedom of Expression 2005, Ch. V, para. 97.

<sup>398</sup> UN General Assembly, Human Rights Council, A/HRC/16/51/Add.3 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, 15 December 2010, p. 18.

<sup>399</sup> I/A Court H.R., *Order of the Inter-American Court of Human Rights of May 28, 2014. Provisional Measures regarding Colombia. Subject Danilo Rueda*, para. 16.

<sup>400</sup> Ombudsman of Ecuador. Thematic report. Scenarios of the Criminalization of Human Rights Defenders and Nature in Ecuador: Challenges for a Constitutional State of Rights, p.26. Accion Ecologica response to the questionnaire for the preparation of the report on criminalization of human rights defenders through the misuse of the criminal law, September 2014. Response from the Centre for Human Rights of the Peoples of Southern Veracruz "Bety Cariño" to the questionnaire for the preparation of the report on criminalization of human rights defenders through the misuse of criminal law, September 2014.

to national courts, thus increasing the cost of transportation and food. In turn, many criminalized persons, have lost their jobs and hence their sources of income, as a result of the temporary or extended time spent in custody, which greatly affects the family economy.

236. In particular, it is very serious for the economy of parents since, upon the incarceration of their spouses, domestic partners, or other relatives, the other is alone at home, which forces him or her to become the principal economic provider and take over the care of their children.<sup>401</sup>
237. Moreover, as it has been reported by some organizations to the IACHR, in the cases of detainees, the economic cost is dramatic for the family "even causing the need to send younger children to work, particularly when it comes to peasant families and when the detainee provides the family's financial support."<sup>402</sup>
238. Finally, the criminalization and stigmatization of human rights defenders affects their work and sources of funding to continue it. When organizations are delegitimized, donors are reluctant to make financial contributions for fear that with this they can be associated with supporting illegal activities.<sup>403</sup> In view of this, the IACHR considers it essential that States adopt comprehensive policies for human rights defenders enabling them to carry out their work in a safe environment.

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<sup>401</sup> IACHR, Human rights and social protest in Guatemala, 149 Period of Sessions, October 28, 2013.

<sup>402</sup> PBI, La criminalización de la protesta social continúa. Acciones penales en contra de defensores y defensoras de derechos humanos: tendencias, patrones e impactos preocupantes, p. 4.

<sup>403</sup> FIDH, Annual Report 2013, Violations of the right of NGOs to funding: from harassment to criminalisation, 2013, p. 62.



CHAPTER 5  
PRINCIPLE OF LEGALITY  
AND MEASURES TO PREVENT  
THE MISUSE OF CRIMINAL LAW  
AND PROTECT THE RIGHT  
TO DEFEND RIGHTS





## PRINCIPLE OF LEGALITY AND MEASURES TO PREVENT THE MISUSE OF CRIMINAL LAW AND PROTECT THE RIGHT TO DEFEND RIGHTS

### A. *The Formulation of Offenses under the Principle of Legality*

239. As seen in Chapter II, the processes of the misuse of criminal law against defenders are initiated by applying criminal offenses that directly criminalize legitimate activities in defense of human rights, as is the case of those criminal offenses restricting the exercise of social protest or contempt offenses that criminalize legitimate activities framed within the right to freedom of expression.
240. The problem of criminalization also persists through the misapplication of criminal offenses formulated in ambiguous or vague terms, with unclear modalities of participation in the crime, without specifying the intent that is required for the behavior to become unlawful, preventing adequate knowledge of the behaviors that are sanctioned. The latter allows wide discretion to judicial officers, who can make use of these vague or ambiguous offenses to the detriment of defenders. For example, the Commission is aware of the application of offenses contrary to the rule of law and the presumption of innocence to the detriment of human rights defenders in the context of social protest.

In 2003, eight leaders and activists of the indigenous Mapuche people in Chile were convicted as perpetrators of crimes characterized as terrorism under Law No. 18,314.<sup>404</sup> Regarding this case, the Commission found that Law No. 18,314 criminalizes conducts that do not have the nature and severity of terrorism under international law. At the same time, it highlighted that the reform of the Terrorism Act of 2010, that eliminated the "presumption of terrorist purpose," did not involve a substantial

<sup>404</sup> Article 1 of the Act provides that "terrorist offenses are those listed in Article 2, when they concur in any of the following circumstances 1. That the offense is committed with the aim of producing in the population or part of it justified fear of being victims of crimes of the same species, is by the nature and effects of the means employed, or by the evidence that it is following a plan of premeditated attack against a particular category or group of people. The production of fear in the general population will be presumed, unless proven otherwise, if the crime is committed using explosives or incendiary devices, weapons of mass destruction, toxic, corrosive or infectious or other means which may cause havoc, or by sending letters, packages or similar objects, explosive or toxic effects (...)"

modification that made the law compatible with the principle of legality, that it was a structural change in which the above terminology is preserved, and that alterations were reduced to the order of the phrases and connectors used to attach the three scenarios that would "presume terrorist purpose." For its part, the Inter-American Court noted that in this case the legal definition of crimes implies that the offending behavior is defined as clearly and precisely as possible, because in that definition, the special intent or purpose to produce "fear in the population in general" is key to distinguish conduct of a terroristic nature from one that is not, and without it the behavior would not qualify as such. Consequently, it decided "that the said presumption of such intention when given certain objective factors (including "the fact of the crime using explosives or incendiary devices") violates the principle of legality enshrined in Article 9 of the Convention, and also the presumption of innocence under Article 8.2 of the same instrument."<sup>405</sup>

241. The Commission understands that, in principle and as an exercise of its criminal policy, it corresponds to the State to determine the behaviors to be qualified as crimes and in regard to which its punitive power is activated.<sup>406</sup> However, certain elements may be derived from Article 9 of the American Convention, enshrining the principle of legality, which should be observed by States when exercising the power to define the criminal offenses.
242. The principle of legality comprises two dimensions: formal and material. The formal legality involves the issuance of legal rules adopted by the legislature following the procedure required by the domestic law of each State, enacted for reasons of general interest and the purpose for which they are established. This implies that they are adopted for the common good.<sup>407</sup> By virtue of this, States

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<sup>405</sup> I/A Court H.R., *Norín Catrimán and others (leaders, members and activist Mapuche Indigenous People) v. Chile*. Merits, Reparations and Costs. Judgment of May 29, 2014. Series C No. 279, para. 171. During the 154<sup>o</sup> Period of Sessions of the IACHR, there was a hearing held on March 17, 2015 regarding the situation of extractive industries and human rights of the Mapuche people in Chile. In particular, the State of Chile indicated during the hearing "With regard to the criminalization of indigenous protests in Chile an advisory committee by the President of the Republic was established, for the purposes of amending the penal legislation of the antiterrorism law, so that legislative proposals are expected to be made."

<sup>406</sup> *Ibid.*, para.116.

<sup>407</sup> I/A Court H.R., Advisory Opinion OC-6/86 of May 9, 1986, the term legislation in Article 30 of the American Convention on Human Rights, Párr.29. According to the Inter-American Court "one cannot interpret the word "laws," used in Article 30, as a synonym for just any legal norm, since that would be tantamount to admitting that fundamental rights can be restricted at the sole discretion of governmental authorities with no other formal limitation than that such restrictions be set out in provisions of a general nature. Such an interpretation would lead to disregarding the limits that democratic constitutional law has established from the time that the guarantee of basic human rights was proclaimed under domestic law. Nor would it be consistent with the Preamble to the American Convention, according to which "the essential rights of man are... based upon attributes of the human personality and... they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states.." para. 26.

must refrain from criminalizing activities that are specific to the promotion and protection of human rights.

243. On the other hand, the material dimension of the principle of legality implies that criminal offenses be formulated unambiguously in strict, precise, and unequivocal terms that clearly define the conduct penalized as punishable crimes, by precisely establishing the elements and factors that distinguish them from other behaviors that are not punishable offenses or are punishable under other criminal offenses.<sup>408</sup>
244. Similarly, the Court has stated that "the codification of a crime shall be stated expressly, accurately, taxatively, and previously, even more so when criminal law is the most restrictive and severe means to establish liabilities for illicit behavior, taking into account that the legal framework shall provide juridical certainty to its citizens."<sup>409</sup> In turn, it has stressed that it corresponds to the judge "upon applying criminal law, to strictly abide by the provisions thereof and be extremely rigorous when likening the accused person's conduct to the criminal definition, so as not to punish someone for acts that are not punishable under the legal system."<sup>410</sup>
245. Regarding the risks posed by the lack of precision in the definition of offenses, the Inter- American Court has noted that "Ambiguity in describing offenses creates doubts and the opportunity for abuse of power, which is particularly undesirable when determining the criminal liability of an individual and punishing the latter with penalties that severely affect fundamental attributes such as life or freedom."<sup>411</sup> The lack of specificity of criminal offenses causes inaccuracies that include broad modalities of participation, changing the characteristics of the crime in question.<sup>412</sup> In failing to comply with these requirements, the principle of legality established in Article 9 of the American Convention is violated.<sup>413</sup>

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<sup>408</sup> IACHR, *Report on the Situation of Human Rights in Peru* (2000), OAS/Ser.L/V/II.106, Doc. 59 rev. 2 June 2, 2000, paras. 80, 168; IACHR, *Report on Terrorism and Human Rights*, OAS/Ser.L/V/II.116, Doc. 5 rev. 1 corr., October 22, 2002, para. 225; I/A Court H.R., *Castillo Petrucci et al v. Peru*, judgment of May 30, 1999 (merits, reparations and costs), Series C No. 52, para. 121; Cantoral Benavides v Peru. Judgment of August 18, 2000. Series C No. 69, para. 157; *Case of Ricardo Canese v. Paraguay*. Judgment of August 31, 2004. Series C No. 111, para. 174; *Case De la Cruz Flores v. Peru*. Judgment of November 18, 2004. Series C No. 115, para. 79; *García Asto and Ramírez Rojas v. Peru*. Judgment of November 25, 2005. Series C No. 137, para. 188; *Usón Ramírez v Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 20, 2009. Series C No. 207, para. 55.

<sup>409</sup> I/A Court H.R., *Case of Usón Ramírez v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 20, 2009. Series C No. 207, para. 55; and *Case of Kimel v. Argentina*. Merits, Reparations and Costs. Judgment of May 2, 2008. Series C No. 177, para. 63.

<sup>410</sup> I/A Court H.R., *De la Cruz Flores v. Peru*. Judgment of November 18, 2004. Series C No. 115, para. 82; *García Asto and Ramírez Rojas v. Peru*. Judgment of November 25, 2005. Series C No. 137, para. 190.

<sup>411</sup> I/A Court H.R., *Castillo Petrucci vs. Peru*. Judgment of May 30, 1999. Series C No. 52, para. 121; *Case of Ricardo Canese v Paraguay*. Judgment of August 31, 2004. Series C No. 111, para. 174.

<sup>412</sup> I/A Court H.R., *Case of Lori Berenson Mejía v. Peru*. Judgment of November 25, 2004. Series C No.119, paras. 117 and 118.

<sup>413</sup> I/A Court H.R., *Castillo Petrucci v. Peru*. Judgment of May 30, 1999. Series C No. 52, para. 121.

The Commission has indicated that compliance with the principle of legality in these terms, allows people to effectively determine their conduct in accordance with the law.<sup>414</sup> As stated by the IACHR, "the principle of legality has a specific role in the definition of crimes; on the one hand, it guarantees individual liberty and safety by pre-establishing the behavior that is penalized clearly and unambiguously and, on the other hand, it protects legal certainty."<sup>415</sup>

246. The Inter-American Court has decided a number of cases concluding that the principle of legality was violated, for example, by the existence of offenses that "refer to actions not strictly defined, so that they may be interpreted similarly within both crimes."<sup>416</sup> The Court has placed a particular emphasis on the problems of such ambiguities, as they may involve a series of restrictions on the guarantees of due process as in the case of a crime or another, and a variation on the sentence to be imposed.<sup>417</sup> The Court has also indicated that there is no certainty about the criminal conduct in these situations, the elements with which they are carried out, the objects or property against which they are carried out, and their effects on society as a whole.<sup>418</sup> The Inter-American Court has also evaluated the precision in the formulation of crimes regardless of their connection with other offenses. For example, referring to libel in Chile and Venezuela, it has indicated that States incorporate "a description that is vague and ambiguous and [ ] does not specify clearly the typical forum for a criminal behavior, which could lead to broad interpretations, allowing the determined behaviors to be penalized incorrectly by using the criminal codification."<sup>419</sup> More specifically, in the case *Usón Ramírez*, the Inter-American Court referred to the lack of specificity of intent in the conduct. In the words of the Court, when the injury required is not specified "such law allows that the subjectivity of the offended party determine the existence of crime, even when the active subject did not have the intent to injure, offend, or disparage the passive subject."<sup>420</sup>

<sup>414</sup> IACHR, *Report on Terrorism and Human Rights*, OAS/Ser.L/V/II.116, Doc. 5 rev. 1 corr., October 22, 2002, para. 225, and Executive Summary, para. 17.

<sup>415</sup> IACHR, Application and Arguments before the Inter-American Court of Human Rights in the case of *De la Cruz Flores v. Peru*; Cited in: I/A Court H.R., *De la Cruz Flores v. Peru*. judgment of November 18, 2004 (merits, reparations and costs), Series C No. 115, para. 74.

<sup>416</sup> I/A Court H.R., *Case of Cantoral Benavides v. Peru*. Judgment of August 18, 2000. Series C No. 69, para. 153; I/A Court H.R., *Castillo Petruzzi v. Peru*. Judgment of May 30, 1999. Series C No. 52, para. 119.

<sup>417</sup> I/A Court H.R., *Castillo Petruzzi v. Peru*. Judgment of May 30, 1999. Series C No. 52, para.119; *Case of Lori Berenson Mejía v. Peru*. Judgment of November 25, 2004. Series C No. 119, para. 119.

<sup>418</sup> I/A Court H.R., *Case of Lori Berenson Mejía v. Peru*. Judgment of November 25, 2004. Series C No. 119, para. 117.

<sup>419</sup> I/A Court H.R., *Case of Usón Ramírez v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 20, 2009. Series C No. 207, para. 56; *Case Palamara Iribarne v. Chile case*. Judgment of November 22, 2005. Series C No. 135, para. 92.

<sup>420</sup> I/A Court H.R., *Case of Usón Ramírez v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 20, 2009. Series C No. 207, para. 56

247. The IACHR considers it essential that States adopt measures of an administrative, legislative, and judicial nature to verify that the criminal offenses contained in the legislation satisfy the principle of legality both in their content and in application. This implies that lawmakers observe the strict requirements which characterize the codification of criminal offenses to satisfy the principle of legality, and thus ensure that they are formulated explicitly, precisely, and previously, thereby providing legal certainty to the citizen.<sup>421</sup>
248. Additionally, States must abolish or amend those rules that directly criminalize the activities of promotion and protection of human rights recognized in international law, ensuring that legitimate activities in defense of human rights are not considered as criminal offenses.

## ***B. Performance of Justice Operators under the Principle of Legality***

249. As noted in the previous section, when criminal offenses are not formulated in accordance with the principle of legality because of the elements of the offense or given the ambiguity in their content, the door to discretion and arbitrariness opens in the application of criminal law by justice operators.
250. As a result, in some countries of the hemisphere, justice operators in charge of the exercise of criminal action and criminal prosecution do not carry out their activities in accordance with the principle of legality. This has contributed to the manipulation of criminal law against defenders through the initiation of unfounded criminal proceedings, subjecting them to unreasonable proceedings and pretrial detention in times that are crucial to the defense of their causes.
251. The Commission has noted that justice operators, including judges, prosecutors, and public defenders, contribute from their respective competencies to ensure access to justice through the guarantee of due process and the right to judicial protection.<sup>422</sup> However, despite the international community's recognition of the importance of the work of justice operators, in several States of the region the latter carries out their duties without proper guarantees of independence, both at the individual level and at the institutions where they work.<sup>423</sup>
252. The Commission notes that when justice operators lack the necessary guarantees of independence and impartiality, they may be pressured to use the criminal justice system against defenders, and thus serve the interests of certain State and non-State actors that are seeking to stop the defender's work by considering it an obstacle to their political or economic interests.

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<sup>421</sup> I/A Court H.R., *Case Kimel v. Argentina*. Merits, Reparations and Costs. Judgment of May 2, 2008 Series C No. 177, para. 63.

<sup>422</sup> IACHR, *Guarantees for the Independence of Justice and Operators. Towards Strengthening Access to Justice and the Rule of Law in the Americas*, OAS/Ser.L/V/II.Doc.44, December 5, 2013, para. 19.

<sup>423</sup> *Ibid.*, para.3.

253. To ensure that the decisions of justice operators are not discretionary, all their actions should be guided by the principle of legality. As the Inter-American Court has held: "under the rule of law, the principles of legality and non-retroactivity govern the actions of all the State's bodies in their respective fields, particularly when the exercise of its punitive power is at issue."<sup>424</sup>
254. The Commission has identified that some States have issued guidelines to allow justice operators to adjust their activities to the principle of legality, especially regarding the definitions of criminal offenses that suffer from ambiguity. The High Courts of some States have also issued judgments that further specify the terms in which the criminal offenses that have been misused to criminalize the work of human rights defenders have to be interpreted.
255. These actions constitute positive steps against criminalization. The Inter-American Court has noted that "in a democratic system, precautions must be strengthened to ensure that punitive measures are adopted with absolute respect for the basic rights of the individual, and subject to careful verification of whether or not unlawful behavior exists."<sup>425</sup> In this regard, the Commission considers that these precautions are especially important in cases involving human rights defenders. Discussed below are some of the positive actions that have been taken by States to prevent and avoid criminalizing.

### ***C. Assessing Elements of Crimes in Accordance with International Law Standards***

256. The Commission considers that in the proceedings initiated against defenders, justice operators must pay special attention in determining whether the conduct constitutes a proscribed, unlawful, guilty, and punishable action. In this regard, according to the Inter-American Court, prosecutors must ensure the correct application of law and search for the truth of the events that took place, acting with professionalism, good faith, procedural loyalty, considering elements to prove the offense and the responsibility of the person accused with such crime, as well as those that may exclude or mitigate his or her criminal responsibility.<sup>426</sup>
257. In line with the above, the IACHR has learned that in some States justice operators have ordered the closure, archival, or dismissal of investigations after reviewing the charges filed against human rights defenders that are unfounded or are a mere retaliation to their right to defend rights.
258. The Commission considers positive the actions of justice operators in not initiating or terminating a process when, after an objective and impartial investigation, it is

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<sup>424</sup> I/A Court H.R., *Case of the Cruz Flores v. Peru*. Merits, Reparations and Costs. Judgment of November 18, 2004. Series C No.115, para. 80.

<sup>425</sup> *Ibid.*, paras.81-82.

<sup>426</sup> I/A Court H.R., *Case of Tristán Donoso v. Panama*. Preliminary Objection, Merits, Reparations and Costs. Judgment of January 27, 2009. Series C No. 193, para. 165.

demonstrated that the indictment in which the process is based is unfounded. In this regard, the UN Guidelines on the Role of Prosecutors state that the rules governing the performance of prosecutors should contribute to a fair and equitable criminal system and the effective protection of citizens against crime<sup>427</sup>, and thus "shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded"<sup>428</sup>.

259. Despite this, the Commission has learned that in some States justice operators face challenges in the application of criminal law when dealing with criminal offenses that directly criminalize the promotion and protection of human rights. In response, the IACHR considers that justice operators must take into account the international instruments protecting human rights defenders, interpreting the definitions of the criminal offenses in a manner consistent with the American Convention on Human Rights and other legal instruments. In other words, they must undertake a conventionality control between internal norms and the American Convention.<sup>429</sup>
260. According to the applicable principles, the IACHR considers that the judicial officers should refrain from initiating criminal proceedings against defenders under criminal offenses that are contrary to international standards, such as contempt laws that criminalize the promotion of LGBT rights, without prejudice to the State's obligation to adopt domestic laws to harmonize its legislation with the standards of the inter-American system.
261. In this regard, the Commission considers that in determining whether a defender should be subjected to a criminal process, judicial operators must examine whether there is a justification, such as the legitimate exercise of a right or a justifying state of necessity<sup>430</sup>, which may involve the execution of a typical criminal behavior which nevertheless is contained under criminal law. For example, the IACHR has been informed of the initiation of proceedings against defenders for criminal offenses, such as blocking or obstructing the roads and others that protect freedom of transit, when defenders obstruct public roads as a result of the exercise of their rights to freedom of expression and assembly through peaceful protests.<sup>431</sup>

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<sup>427</sup> Guidelines on the Role of Prosecutors, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana (Cuba) August 27 to September 7, 1990, ONU doc. A/CONF.144/28/Rev.1 p.189 (1990).

<sup>428</sup> *Idem*.

<sup>429</sup> *Idem*.

<sup>430</sup> "It occurs when the agent makes a typical conduct in order to protect their own or other people's right to a threat or actual or imminent harm and produces such efforts injury less serious than the disabled in the legal rights of another person, provided you cannot go to a different route." See, V. Velasquez, Fernando. Manual of Criminal Law. General Part. Editorial Themis, Bogota, 2004, p. 379.

<sup>431</sup> Zaffaroni, E. Raul. Criminal Law and Social Protest. In: Bertoni, Eduardo (Coordinator). It is legitimate the criminalization of social protest. Criminal Law and Freedom of Expression in Latin America. Law School. Center for Studies on Freedom of Expression and Access to Information. University of Palermo, 2010, p. 13. In this regard states: "if in a community sanitary, basic supply needs are unattended, if lives are in danger, if the contamination of drinking water or malnutrition is not addressed and is about to cause irreversible



262. The Commission notes that in some countries of the region under the principle of procedural opportunity, the entity in charge of public prosecution is authorized to refrain from exercising that power or request to the court the dismissal of cases, under certain conditions prescribed by law and for reasons of criminal or procedural policy.<sup>432</sup> The Commission has had the opportunity to rule on the application of the criterion of opportunity in some cases, and has reiterated the importance of its implementation not to be contrary to the State's duty to clarify the facts.<sup>433</sup>
263. The criterion of opportunity can be a positive measure in cases in which the organs responsible of criminal prosecution identify that there is an abuse of the criminal law to criminalize human rights defenders. However, considering that its effect is the extinction of the penal action, it is essential to apply it fulfilling the requirements of the respective law, by reasoned decision that provides the facts, reasons, and conditions for its application. Finally, it is essential that the victim affected by the commission of a crime be allowed to participate in the determination on the application or not of that criterion and that there be an appeal procedure to review the decision to grant the prosecutorial discretion (principle of opportunity).<sup>434</sup>
264. The IACHR wants to highlight that, in order to prevent the application of the principle of opportunity from leading to impunity, it is essential that the waiver of prosecution is exercised taking into account human rights law. The Commission emphasizes that the principle of opportunity or other criminal benefits should not

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damage, the community is isolated and authorities does not respond to requests [...] it would be justified that with a roadblock public and authorities attention is called, even if it has a considerable length and causes danger to property or business. It is the use of less offensive means that it is up to people to draw attention to their needs in extreme situations."

<sup>432</sup> Cafferata Nores, José I and others. *Manual de derecho procesal penal* (Spanish only), p. 75.

<sup>433</sup> See, e.g., IACHR, Report No. 29/05, Case 11.995, Merits, Case of the Rochela Massacre, Colombia, Mar. 7, 2005; IACHR, Report No. 62/08, Merits, Manuel Cepeda Vargas, Colombia, July 25, 2008.

<sup>434</sup> According to Winfried Hassemer "while a criminal law lodges assumptions of opportunity, respect for the rule of law on the part of the procedure depends on whether the cases are determined with absolute precision. The rules of opportunity vaguely formulated, completely destroy the principle of legality. Opportunistic prosecution is then spread in epidemics: The decisions of the investigative authorities not to prosecute a crime cannot be effectively controlled and therefore cannot be limited. If opportunity assumptions are introduced in criminal proceedings, there are still other ways to limit the dangers to the rule of law: a) participation of the competent court or the investigating judge to erect a supervisory body and lessen the objections arising from the principle of division of powers; b) acceptance of the affected in any case when the stay of proceedings has a negative effect on him. If this is not the case, the requirement of acceptance is also advisable because in any case, there remains a suspicion of crime on a citizen not guilty without judicial clarification and this is a legal prejudice to the not guilty; c) the requirement of substantiation for all of decision on dismissal as not only the affected person but possibly an interested public can check the reasons for the dismissal; d) setting an effective procedure requiring to litigate as this would allow the person affected to control, with the help of the court, the dismissal of the proceeding. See Hassemer, Winfried. "La persecución penal: Legalidad y oportunidad" (translation from German by Esq. Alfredo Chirino Sánchez.) [Online], Journal of the Association of Criminal Sciences Costa Rica, Year 7, No. 10, September 1995, p. 3.

create any obstacle to due diligence in the investigations of criminality associated with the commission of human rights violations.<sup>435</sup>

265. The IACHR recalls the key role played by justice operators to preserve the rule of law, allowing all complaints to flow in the proper channel through the judicial mechanisms provided by the State, and in the case of human rights violations, the possibility to investigate effectively, punish those responsible, and receive reparations, while ensuring due process to all persons who may be subjected to the exercise of the punitive power of the State.<sup>436</sup> In this regard, the IACHR urges justice operators to ensure the effective access to justice in an independent and impartial manner, but taking all necessary measures to prevent State investigations from arriving at unjust or unfounded judgments against people who legitimately claim the respect and protection of human rights.<sup>437</sup>

#### ***D. Guidelines for the Work of Justice Operators***

266. The Commission has identified that some States have issued directives to guide the actions of justice operators and considers this a good practice to avoid misuse of criminal law against human rights defenders. For example, the Commission received information indicating that in Colombia various types of guidelines have been adopted to guide the action of the Attorney General's Office, making it more efficient and providing security to victims and the accused.

The Colombian government has indicated that the Attorney General's Office, in response to allegations of criminalization, through Resolution 01566 of September 4, 2012 has formed a group of prosecutors in charge of investigating the existence of false witnesses. At the same time, it indicated that the Memorandum 030 of August 2011 defines parameters to be taken into account by justice operators to ensure best practices in investigating cases where the suspects or accused are human rights defenders. Among other things highlighted in the memorandum is the need to: provide timely information to the accused on the origin and type of investigation, and to collect appropriate and sufficient evidence as a guarantee to develop impartial and objective investigations, recalling that intelligence reports are not evidentiary support in

<sup>435</sup> I/A Court H.R., *Manuel Cepeda Vargas v. Colombia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of May 26, 2010. Series C No. 213, para. 216.

<sup>436</sup> IACHR, *Guarantees for the independence of justice operators: Towards strengthening access to justice and the rule of law in the Americas*, OAS/Ser.L/V/II. Doc 44, December 5, 2013, para 1.

<sup>437</sup> IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas*, OAS/Ser.L/V/II.Doc. 66, December 31, 2011. Recommendation 13.

these processes, but rather tools to guide the investigative work. These guidelines were underscored by Memorandum 067 of December 27, 2013.<sup>438</sup>

267. On the other hand, the IACHR notes that the State of Guatemala has also issued guidelines that contribute to the interpretation of criminal offenses. The IACHR, in its *Second Report on the situation of defenders of human rights in the Americas*, indicated that the criminal offenses of usurpation established in the Guatemalan criminal code were used in an excessive and unjustified manner against indigenous persons and *campesinos* who occupy land whose ownership has been disputed with landowners and companies. Since the definition of the crimes of usurpation does not specify what is meant by "unlawfully, with any purpose," nor does it clearly describe the degree of intention required by the active subject for this to be considered a crime, it would frequently be applied to indigenous persons and *campesinos* - who, though they do not have formal title to the property, have for years been in possession of the lands they consider theirs by ancestry or by law.<sup>439</sup>

The Commission was informed that in Guatemala, on May 8, 2012 general instruction No. 3-2012 was published, which establishes guidelines to be observed by members of the Public Ministry regarding allegations of usurpation offenses contained in Articles 256 and 257 of the Criminal Code. In particular, this instruction mandates that prosecutors must verify in a real and effective manner if there has been dispossession, invasion or illegal occupation, the duration of such, and the reasons that motivated it. In turn, in the framework of the investigation for the crime of usurpation, the accused persons shall enjoy all procedural guarantees under national legislation and international treaties on human rights: a) to be informed in advance and in a language they can understand the initiation of criminal proceedings against them; b) to enjoy the national and international guarantees of due process; c) the research phase cannot be exhausted without giving the accused the opportunity to comment and to exercise his or her right to a hearing and to present relevant evidence; d) where there is full evidence of the crime committed by the accused, the prosecution will ask for the corresponding penalties.<sup>440</sup>

<sup>438</sup> Response of the Republic of Colombia to the questionnaire for the preparation of the report on criminalization of human rights defenders through the misuse of criminal law, September 2014.

<sup>439</sup> IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas*, OAS/Ser.L/V/II.Doc. 66, December 31, 2011. p. 37.

<sup>440</sup> Attorney General of the Republic and Head of the Public Prosecutor General Instruction number 3-2012 (Spanish only). Guatemala, May 8, 2012.

268. Some States have also issued guidelines for the justice operators to prevent the prosecution of human rights defenders as a result of their activities of protection and promotion of human rights.

As reported to the Commission, in the United States the Manual for Federal Prosecutors from the Department of Justice provides guidance to justice operators to prevent the prosecution of human rights defenders for constitutionally protected activities.<sup>441</sup> The Manual sets a high standard for prosecutors to be able to initiate criminal proceedings and to prevent the misuse of the law in detriment of individuals doing legitimate activities.

269. These guidelines constitute positive steps since they prevent operators from acting with broad discretion in interpreting criminal offenses and restrict the possibility for the criminal law to be used against human rights defenders in retaliation for their work. However, the Commission notes that under Article 2 of the American Convention, the State is obliged to eliminate laws and practices of any nature that result in the violation of the guarantees established in the Convention, as well as to adopt laws and develop practices leading to the effective observance of these guarantees.<sup>442</sup>

## ***E. Judicial Decisions***

270. The Commission has been informed that in some States, the courts have responded to the criminalization through judicial decisions recognizing the use of criminal law to criminalize human rights defenders. This sometimes involves ordering the closure of proceedings against human rights defenders when there are no signs of a crime, or the correction of anti-conventional criminal offenses that are used to criminalize human rights defenders by interpreting them according to international law standards.

According to information provided by civil society organizations in Nicaragua, on February 9, 2013, the National Police detained approximately 12 people who were in a sit-in protesting the expansion of mining exploration and exploitation in the municipality of Santo Domingo, Chontales by the company B2 Gold. The detainees were transferred to the Directorate of Judicial Aid and accused by

<sup>441</sup> Response from the Centre for Human Rights of the American Bar Association for the preparation of the report on criminalization of human rights defenders through the misuse of criminal law, September 15, 2014, p. 10.

<sup>442</sup> I/A Court H.R., *Case of the Dos Erres Massacre v. Guatemala*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 24, 2009. Series C No. 211, paragraph 122.

the prosecution for the crimes of threats, aggravated damage, serious injury, minor injury, obstruction of functions, usurpation of private domain, coercion, and displacement to the detriment of the mining company. On February 25, 2013, the District Criminal Court of Hearings of Juigalpa, Chontales, admitted the charge and ordered the preventive custody of those who later obtained freedom on March 19, 2013. According to the reports received, the accused were pressured to reach an agreement with the company. On April 25, 2013, the Criminal District Trial Judge of Juigalpa passed judgment No. 8 of 2013, dismissing all processed in the following terms: "This is a clear example of manipulation of justice by the company as a way to silence the protest and achieve, using the police authority and political authority as pretended mediators in conflict situations where both are involved. The prosecution and judges contributed to the intimidation of miners with the arrests in exceptional conditions and with the threat of convictions for criminal offenses in which their participation was not proven."<sup>443</sup>

271. The Commission has also received information regarding decisions declaring criminal offenses that do not conform to the principle of legality unconstitutional. Sometimes in these decisions the judges undertook conventionality control between the criminal offenses contained in domestic legislation and the legal standards set by the inter-American system.

In Uruguay the Supreme Court of Justice, through judgment of April 24, 2015 declared the unconstitutionality of the criminal offense of "riot" referred to in Article 145 of the Criminal Code. Said unconstitutionality action was filed by six people prosecuted for the crime of rioting after being arrested in a demonstration that took place on February 15, 2013, at the headquarters of the Supreme Court of Justice. Article 145 of the Criminal Code provides: "those who take part in a riot shall be punished with three to nine months in prison. Those who gather in numbers not less than four to cause uproar among the people, with some illicit purpose that is not included in the above crimes or to disrupt with shouts, insults or threats, a public meeting, or holding a party, religious or civic, or to require from individuals something right or wrong commit rioting." The Court's analysis took into account the criteria established by the Inter-American Court in relation to the principle of legality regarding the development of the criminal offenses established in

<sup>443</sup> IACHR, 153 Period of Sessions, Hearing on misuse of criminal law to criminalize human rights defenders, on 31 October 2014. Prepared by the International Federation for Human Rights - FIDH, Association pro-Human Rights - APRODEH, Nicaraguan Center for Human Rights - CENIDH, Committee of Relatives of the Detained and Disappeared in Honduras - COFADEH, Mexican Commission for the Defense and Promotion of Human Rights - CMDPDH, Ecumenical Commission on Human Rights - CEDHU and Global Justice.

the case of *Kimel vs. Argentina* and determined the unconstitutionality of this article for contradicting the principle of legality and proportionality enshrined in the Constitution. In particular, the Supreme Court noted that, when referring to an "unlawful purpose," the article did not define "purpose" in a clear and precise way. In addition, it does not set a clear and precise limit of protection to the rights of the people, thus ultimately its application is left to the goodwill of the authority. Additionally, the judgment indicates that this provision is contrary to the principle of proportionality and that "it is clear to most that to criminally punish with a penalty restricting freedom (even if it is in prison) persons for meeting excitedly, even for the purposes already stated, translates a clear excess, when public peace, which is what the rule is intended to protect and safeguard (...), in reality is not necessarily affected with the meeting."<sup>444</sup>

272. Moreover, the Commission is also aware of judgments by means of which criminal proceedings against human rights defenders are finalized and it is ordered to investigate whether the justice operators initiated criminal proceedings to punish defenders in retaliation for their work in defense of human rights.

The Commission learned that Guatemala had initiated criminal proceedings against community leaders for allegedly holding back employees of El Tambor mining project, located between the towns of San José del Golfo and San Pedro Ayampuc. On May 27, 2014, the charges against the defender and community leader Telma Yolanda Oquell Veliz del Cid were dismissed by the Seventh Court of First Criminal Instance. However, the judge opened proceedings against four other community leaders for these same accusations. Finally, on February 27, 2015 the Eighth Court of Sentencing acquitted the four community leaders pointing out "that the victims made errors when providing their testimony which prevents the establishment of the realization of a prohibited conduct by the accused" and "lacking evidence to demonstrate a proscribed, unlawful, and culpable conduct it is inevitable to say that there is not a crime to reproach the defendants." Additionally, the judgment ordered to send to the Public Ministry (MP) the complaint filed by Rafael Maldonado, a lawyer with the Centro para la Acción Legal, Ambiental y Social (CALAS), who reported that the Public Ministry and the plaintiffs conspired to make counterfeit evidence, noting that there are two affidavits that were developed by the prosecution of Palencia by two plaintiffs at the same time and in the same place.

<sup>444</sup> Supreme Court of Uruguay, Judgment No. 104 of April 24, 2015.

273. The IACHR considers that in cases where there is evidence regarding the misuse of the criminal law by public officials, States should initiate investigations or disciplinary, administrative, or criminal proceedings that may be necessary with regard to justice operators that have violated the law by investigating, issuing interim measures, or wrongly condemning human rights defenders.
274. Moreover, the Commission has also identified a number of judicial decisions through which the application of offenses such as libel, defamation and slander is restricted or eliminated when it comes to expressions uttered against public officials in the exercise of his duties or matters of public interest, in direct application of the standards developed by the Inter-American system. In the last two decades, several countries of the region, including Argentina (1993),<sup>445</sup> Paraguay (1998),<sup>446</sup> Costa Rica (2002),<sup>447</sup> Chile (2005),<sup>448</sup> Honduras (2005),<sup>449</sup> Panama (2005),<sup>450</sup> Guatemala (2006),<sup>451</sup> Nicaragua (2007),<sup>452</sup> Bolivia (2012),<sup>453</sup> and Ecuador (2013)<sup>454</sup> repealed their laws of contempt, either through legislative reforms or decisions of higher courts.

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<sup>445</sup> State Argentina. [Law 24,198 of June 3](#), 1993. Ministry of Economy and Public Finance of Argentina, Law 24,198 (Spanish only) See also: IACHR. Report No. 22/94. Case 11.012 (Argentina). Amicable settlement. September 20, 1994.

<sup>446</sup> IACHR. [Third Report on the Situation of Human Rights in Paraguay](#). OAS/Ser./L/VII.110 doc. 52, March 9, 2001, Chapter VI.

<sup>447</sup> Costa Rica. National Congress. Law No. 8224. Repeal of the offense of contempt. Attorney General of the Republic of Costa Rica, Law 8224.

<sup>448</sup> Law 20,048 of August 31, 2005 repealed the criminal offense of contempt (section 263) and amended Article 264 as follows: "He who makes threatening statements during the sessions of the legislative bodies or at hearings of the courts to a deputy or a senator or a member of such courts, or a senator or deputy for the opinions expressed in Congress, or a member of a court for rulings they acted or ministers of state or other authority in the exercise of office, shall be punished by imprisonment in any degree. The serious disruption of the order of the sessions of the legislative bodies or hearings of the courts, or thereby causing turmoil or encouraging disorder in the office of an authority or public corporation to the point of preventing their actions will be punished the penalty of imprisonment in its minimum degree and a fine of six to ten tax units per month, or only the latter."

<sup>449</sup> Repealed by the Supreme Court in a ruling dated 29 April 2005 on the appeal of unconstitutionality No. 2686-03. The sentence was issued by the Congress of the Republic in No.202-2005 Decree dated August 2, 2005, published in Official Gazette 30,830 dated October 22, 2005.

<sup>450</sup> Law 22 of June 29, 2005 prohibits the application of sanctions for contempt, being repealed Articles 307 and 308 of the Penal Code. National Assembly of Panama, Law 22 of 2005.

<sup>451</sup> On February 1, 2006, the Constitutional Court of Guatemala decided to declare the unconstitutionality of the crime of contempt that was regulated in Articles 411, 412 and 413 of the Penal Code. Constitutional Court of Guatemala. Partial A ruling of unconstitutionality General. Record 1122-2005, from February 1, 2006.

<sup>452</sup> The new Penal Code adopted in 2007 does not define the crime of contempt, formerly established in Article 347. Judiciary of Nicaragua. Law No. 641 of 2007, Penal Code.

<sup>453</sup> On September 20, 2012, the Plurinational Constitutional Court declared Article 162 of the Criminal Code unconstitutional which sanctioned contempt with up to three years' imprisonment. Bolivia Plurinational Constitutional Court. Plurinational Constitutional Judgment 1250/2012.

<sup>454</sup> The new Comprehensive Criminal Code, approved in 2013, abolished the offense called "insult", and the criminal content of Articles 230, 231 and 232 of the Criminal Code previously in force are not taken up in Books I and II of the new Comprehensive Criminal Code Code. El Ciudadano. December 17, 2013. [El nuevo Código Penal mejorará la seguridad ciudadana](#) (Spanish only); El Ciudadano. December 19, 2013. [El Ejecutivo analizará minuciosamente el proyecto de Código Integral Penal \(AUDIO\)](#) (Spanish only).

Along the same lines, the Plurinational Constitutional Court of Bolivia, in a ruling of September 20, 2012 declared Article 162 of the Criminal Code unconstitutional, which provided for an aggravated prison sentence to whoever incurred in libel, slander, or defamation to the detriment of a public official. For the Court, contempt creates an unconstitutional inequality between officials and citizens, which in turn disproportionately affects the right to freedom of expression. For example, in reviewing the constitutionality of the subtype of the offense referred to slander against public officials, the Constitutional Court held that "the possibility of denouncing the commission of a crime and corruption for the existing general interest should be virtually unrestricted and must be guaranteed to all citizens who cannot be limited in that capacity of denouncing acts of corruption." In this regard, it stressed that "the crime of contempt involves a disproportionate reaction to the false allegations of the commission of offenses by public servants, it implies that a criminal complaint against a public official could only be presented when there is certainty about the commission of a crime, unnecessarily discouraging citizens from reporting irregularities and preventing serious criminal investigations to corroborate or discard complaints."<sup>455</sup>

275. The IACHR considers that the decisions which determine that criminal norms are not applicable for being contrary to the principle of legality, in order to adapt them to international standards, constitute positive steps to prevent the misuse of criminal law. These decisions ensure that justice operators will not apply rules for the mere purpose of impacting human rights defenders in the exercise of their duties. Therefore, the IACHR urges State organs to carry out actions aimed at promoting conventionality control in their decisions in order to effectively protect the right to defend human rights.

## ***F. Recognizing the Importance of the Work of Human Rights Defenders***

276. As noted above, the lack of due recognition by the authorities places human rights defenders in a situation of vulnerability. The fact that the work of human rights defenders is not properly valued and recognized by the authorities and society in general is one of the major challenges for the defense of human rights.<sup>456</sup>

<sup>455</sup> Bolivia Plurinational Constitutional Court. Unconstitutional concrete action. Record: 00130-2012-01-AIC. Judgment 1250/2012 of September 20, 2012.

<sup>456</sup> IACHR, *Human Rights of Migrants and Other Persons in the Context of Human Mobility In Mexico*, OAS/Ser.L/V/II.Doc. 48/13, December 30, 2013, para. 276.



277. For this reason, the IACHR considers it essential for the overall protection of human rights defenders to promote a culture that publicly and unequivocally recognizes the fundamental role played by human rights defenders to guarantee democracy and that the exercise of the protection and promotion of human rights is a legitimate action that tends to strengthen the rule of law and the extension of rights and guarantees to all persons.<sup>457</sup>
278. In this context, the IACHR has identified a number of initiatives and practices undertaken by States that seek to recognize the legitimacy of the work of human rights defenders. These initiatives include national recognition campaigns on the importance of the work of human rights defenders, as well as statements by public officials<sup>458</sup>, laws and decrees<sup>459</sup> that call for the recognition of the work of human rights defenders and organizations dedicated to the promotion and protection of human rights and the ceasing of making false accusations against human rights defenders.

In its report *Truth, justice and reparation: Fourth report on the situation of human rights in Colombia*, the Commission indicated that as a result of its on-site visit to Colombia, it took note of important efforts undertaken by the Colombian government intending to promote the recognition of the work of human rights defenders by society and its own officials as a legitimate and necessary activity for democracy and peace building. In particular, the IACHR noted the implementation of public initiatives, such as the "National Roundtable of Guarantees for human rights defenders, social and community leaders," created in 2009, in joint agreement with civil society organizations, and which allows for direct spaces for dialogue with State authorities, for the design and implementation of strategies and actions to defend the work of human rights defenders. The State has indicated that the national process of guarantees has had as one of its major goals the recognition of the legitimacy of the work of defending human rights and non-stigmatization. In its comments on the Draft Report, the State reiterated that it continues to work together with civil society organizations, and with the support of the international community,

<sup>457</sup> IACHR, *Report on the Situation of Human Rights Defenders in the Americas*, OAS/Ser.L/V/II.124 Doc. 5 Rev. 1, March 7, 2006, recommendation 2.

<sup>458</sup> The Commission was informed that under the National Plan for Human Rights, the government of Guatemala acknowledges the invaluable place human rights defenders have in Guatemalan society, as they are an essential element of democracy, and contribute to the fight against impunity and the prevention and reduction of suffering of the victims. Therefore, the State understands that they require special protection and support. COPREDEH, *National Human Rights Policy, 2006-2015* (Spanish only), Guatemala, December 2005.

<sup>459</sup> According to information received by the Commission, a bill to award the national human rights prize *Juan Rafael Mora Porras* is under consideration of the Legislative Assembly of Costa Rica. Its objective is to recognize the anonymous work of human rights defenders. Legislative Assembly of the Republic of Costa Rica, File no. 18723, National Prize for human rights Juan Rafael Mora Porras.

in the design of the agenda and areas of work of the National Roundtable of Guarantees, including the formulation of "public policy on guarantees for the defense of human rights." In the context of the same report, the Commission considered that the implementation of this and other initiatives, such as the National Protection Unit, can enable defenders to conduct their activities in better conditions of security. In addition to the above initiative, as part of its response to the consultation questionnaire for the preparation of this report, the State of Colombia reported on a series of initiatives designed to legitimize the work of defenders, such as Presidential Directive No. 7 'Support, Communication and Cooperation of the State with Human Rights Organizations' of September 9, 1999 and Directive 012 of 2010 handed down by the Attorney General's Office, which orders "all public servants to refrain from making false charges and accusations compromising the safety and honor and good name of human rights organizations and their members. If there is knowledge of any unlawful act committed by members of these organizations it has a duty to inform the competent judicial authority."<sup>460</sup>

279. The Commission has also learned of decisions of national institutions to protect human rights<sup>461</sup> that recognize and urge the recognition of the work of human rights defenders and organizations dedicated to the promotion and protection of human rights.

The Commission learned that in Mexico, the National Human Rights Commission acknowledged in a statement the importance of the work performed by human rights defenders by supporting various groups in vulnerable situations, and contributing to the State's duty to promote and protect the most fundamental rights of individuals, through the actions undertaken in favor of the promotion and defense thereof. As informed to the IACHR, the statement indicated that their work entails risk, which places defenders in a special situation of insecurity, and requires the State to carry out more

<sup>460</sup> Colombia response to the consultation questionnaire to States and civil society to prepare the report on criminalization of human rights defenders through the misuse of criminal law, [Presidential Directive No.07 of 1999](#) and [Directive 012 2010](#).

<sup>461</sup> The Commission noted the recognition that the Ombudsman of Venezuela recently made to different groups of human rights defenders. The Communication for peace recognition, rewards human rights defenders to assist and promote a more just and peaceful society. [Defensora del Pueblo entrega reconocimiento comunicaci3n para la paz](#).

effective measures of protection. For that reason, that Commission expressed the need to design new strategies and programs to protect them.<sup>462</sup>

280. The Commission recalls the importance of national human rights institutions in the prevention of criminalization, which in compliance to the Paris Principles, have the mandate to review the legislation, as well as projects and bills and make the appropriate recommendations to ensure that existing laws respect the fundamental principles of human rights. If necessary, these institutions must recommend the adoption of new legislation, the amendment of legislation in force and the adoption of administrative measures or their modification.<sup>463</sup>
281. While States have the obligation to adopt effective policies of prevention and protection for human rights defenders so they can carry out their work in a safe environment and free of harassment and attacks, the Commission considers that it is particularly important that not only public officials and public institutions recognize the importance of the work of defenders but also all sectors of society, including political, social, religious, business, and media leaders who can contribute to legitimize the work of defenders.<sup>464</sup>

According to information received by the Commission, in Honduras 22 civil society organizations launched in February 2015 a campaign called STOP THE RISK to promote an enabling environment for human rights defenders in the most critical areas of the country where there are frequent conflicts for access to land, territory and the environment<sup>465</sup> and where there have been more processes of misuse of criminal law. According to some civil society organizations, between 2010 and 2014, approximately 3000-4000 individuals were criminalized in Honduras for claiming or protecting the right to land.<sup>466</sup> The STOP THE RISK campaign is directed not only to public authorities, but also the general public, so that the latter recognizes and supports the work of defending and promoting human rights in the current context.<sup>467</sup>

<sup>462</sup> Quadratin México, Necesario proteger a defensores de derechos humanos: CNDH (Spanish only) November 8, 2014.

<sup>463</sup> *Principles relating to the Status of National Institutions (The Paris Principles)*.

<sup>464</sup> UN General Assembly, Human Rights Council, A/HRC/22/L.13, Protecting human rights defenders, Recommendation 18.

<sup>465</sup> Oxfam Internacional, Honduras: Alto al riesgo, campaña de protección para los defensores de los derechos humanos, February 2015; Honduras: se lanza campaña ALTO al RIESGO para los defensores de derechos humanos, February 25, 2015.

<sup>466</sup> Adital, Campaña “Alto al riesgo” demanda seguridad para los defensores de derechos humanos, March 2, 2015.

<sup>467</sup> CIPRODEH, Alto al Riesgo ¡Protección para los y las defensoras de derechos humanos! February 25, 2015.

282. The Commission welcomes initiatives such as those described above, which contribute to legitimize the work of human rights defenders by creating a safe environment, free of obstacles for the defense of human rights. Nevertheless, the IACHR has continued receiving information on the persistence of speeches that discredit human rights defenders in some countries of the region. It also believes that it is necessary to monitor, constantly redesign and follow up on the policies of recognition of the importance of the work of human rights defenders<sup>468</sup>.
283. For this reason, the IACHR considers it essential that global policies to protect human rights defenders contemplate the recognition of the importance of their work in guaranteeing democracy and the rule of law. This is an essential component to ensure the protection of human rights defenders<sup>469</sup> in any national policy on human rights because it contributes to remove the stigma against defenders and reduce the risk of attacks by making society see the importance of their work for the implementation of human rights for the inhabitants of the Americas. The Commission encourages and supports human rights defenders and recognizes that they are the link between civil society domestically and the system of protection of human rights at the international level. Their role in society is essential for guaranteeing and safeguarding democracy and the rule of law.<sup>470</sup>

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<sup>468</sup> IACHR, *Truth, Justice and Reparation: Fourth Report on Human Rights Situation in Colombia*, OAS/Ser.L/V/II.Doc.49/13, para. 1135.

<sup>469</sup> UN General Assembly resolution adopted by the Human Rights Council, Protection of human rights defenders, [A/HRC/RES/13/13](#), April 15, 2010, p.2.

<sup>470</sup> IACHR, *Report on the Situation of Human Rights Defenders in the Americas*, OAS/Ser.L/V/II.124, Doc. 5 Rev. 1, March 7, 2006, para. 330.



CHAPTER 6  
RECOMMENDATIONS



## RECOMMENDATIONS

284. Based on the information and analysis conducted by the Commission throughout this report, and in order to promote the full use of international standards to guide States on lines of action to address criminalization through the misuse of criminal law,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS RECOMMENDS TO THE AMERICAN STATES:

1. To ensure that the authorities or third parties do not use the punitive power of the State and its organs of justice to harass human rights defenders. States must adopt all necessary measures, through judicial investigations, to prevent human rights defenders from being subjected to unjust or unfounded trials.<sup>471</sup>
2. To adopt all necessary legislative, administrative, and other measures to ensure the effective guarantee of the rights and freedoms enshrined in the American Convention and in particular, the right to defend rights. To achieve these objectives, the IACHR urges States to comply with the following specific recommendations:

### ***A. Recognize of the Work of Human Rights Defenders and their Role in Democratic Societies***

285. In order to recognize the work of human rights defenders, States must:
3. Acknowledge publicly and unequivocally the fundamental role played by human rights defenders to guarantee democracy and the rule of law in society, whose commitment is reflected in all levels of government, whether municipal, state or national and in all three powers -executive, legislative or judicial. This can be achieved through special programs, the granting of awards, ceremonies, press releases or other measures that make visible the work of defenders and demonstrate their value and importance to society.
  4. Undertake education and dissemination activities directed towards all State agents, society in general, and the media, to sensitize them on the legitimacy of the work of promotion and defense of human rights, as well as the

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<sup>471</sup> IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas*, OAS/Ser.L/V/II/Doc.66, adopted on December 31, 2011, recommendation 13.



importance and value of the work of human rights defenders and their organizations, as their actions do not weaken the State but strengthen it, taking into account for that the international instruments referred to this subject.<sup>472</sup>

5. Instruct government authorities to ensure that, from the highest-level, spaces for open dialogue with human rights organizations are created to receive their feedback regarding existing policies and the effect of such policies on their work, as well as on legislative gaps. Human rights organizations should also be consulted for inputs and opinions on proposed policies.
6. Strengthen protections for the right to participation of human rights defenders, as well as of those affected or those who may be affected by development projects that impact the enjoyment of economic, social, and cultural rights. For the IACHR, it is extremely important to have this participation before starting any project and at all stages of its implementation.
7. Refrain from making statements that stigmatize human rights defenders and that suggest that defenders, as well as human rights organizations, act improperly or illegally, merely for carrying out of their work to promote and protect human rights. Likewise, give precise instructions to officials on this matter and take disciplinary action against those officials who fail to comply with such instructions.<sup>473</sup> Finally, facilitate a public venue for rectification where human rights defenders may be able to respond to the stigmatizing statements made by officials against them.

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<sup>472</sup> For example the United Nations Declaration on Education on Human Rights and the recommendations of the World Programme for Human Rights Education. Article 4 of the Declaration by United Nations on education and training on human rights states that "education and training should be based on the principles of the Universal Declaration of Human Rights and relevant treaties and instruments, with a view to: a) Raising awareness, understanding and acceptance of universal human rights standards and principles, as well as guarantees at the international, regional and national levels for the protection of human rights and fundamental freedoms ; b) Developing a universal culture of human rights, in which everyone is aware of their own rights and responsibilities in respect of the rights of others, and promoting the development of the individual as a responsible member of a free, peaceful, pluralist and inclusive society; c) Pursuing the effective realization of all human rights and promoting tolerance, non-discrimination and equality; d) Ensuring equal opportunities for all through access to quality human rights education and training, without any discrimination; e) Contributing to the prevention of human rights violations and abuses and to the combating and eradication of all forms of discrimination, racism, stereotyping and incitement to hatred, and the harmful attitudes and prejudices that underlie them. General Assembly of the United Nations Declaration on education and training in human rights, A/RES/66/137, December 19, 2011. IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas*, OAS/Ser.L/V/II/Doc.66, adopted on December 31, 2011, Recommendation 6.

<sup>473</sup> *Ibidem*, recommendation 5.

## ***B. Prevent the Adoption and Implementation of Laws and Policies whose Formulation is Contrary to International Law Standards***

286. With this goal in mind, the American States should:

8. Ensure that criminal offenses included in their legislation are formulated in a manner consistent with the principle of legality. That is, expressly, precisely, comprehensively, and previously, with a clear definition of the criminalized conduct, establishing its elements and allowing it to be differentiated from behaviors that are not punishable or punishable with non-penal measures. States must also refrain from promoting and enacting laws and policies that use vague, imprecise, and broad definitions.
9. Promote the repeal of *desacato* [contempt] laws, regardless of the form in which they are presented, since these norms are contrary to the American Convention and restrict public debate, an essential element of democratic functioning.
10. Promote the modification of laws on criminal defamation to eliminate the use of criminal procedures to protect honor and reputation when information on matters of public interest, public officials, or candidates for public office is disseminated. The protection of privacy or the honor and reputation of public officials, or persons who have voluntarily become involved in matters of public interest, should only be guaranteed through civil law.
11. Decriminalize defamation and promote the modification of ambiguous or vague criminal laws disproportionately limiting freedom of expression, such as those designed to protect the honor of ideas or institutions, in order to eliminate the use of criminal proceedings to inhibit the free democratic debate on all matters of public interest.
12. Promote the review of criminal offenses that protect public order, peace, or national security - such as rebellion, hindrance to public roads, conspiracy, disturbance of the public order, among others - seeking to delimit their scope of application so that they are not applicable to legitimate work in defense of human rights.
13. Ensure that the right of assembly through social protest is not subject to authorization by the authorities nor to excessive requirements that hinder its enjoyment. In this regard, the requirement of prior notification should not be confused with the requirement of prior permission that is discretionally granted. In addition, States must ensure that the limitations placed on public and peaceful demonstrations are strictly to prevent serious threats and imminent danger from materializing.

14. Regarding the expressions relating to terrorism, restrict them to instances of intentional incitement to terrorism- understood as a direct call to engage in terrorism which is directly responsible for an increase in the likelihood of the occurrence of a terrorist act- , or participation in terrorist acts (for example by directing them). The same standard should apply to cases in which offenses such as treason or rebellion are intended to be applied to the dissemination of ideas or information that are uncomfortable for government authorities. Likewise, the application of the aforementioned criminal offenses must be restricted in the context of social demonstrations.
15. Respect the rights of human rights defenders and organizations to manage their resources, including their financing, in accordance with legitimate laws and to formulate their program of activities with total independence and without undue interference from the authorities.
16. Reform and/or repeal all legislation that prohibits or criminalizes organizations or human rights defenders for the simple fact of receiving foreign funding destined to support their work.
17. Exercise the functions of control and supervision of foreign sources of financing of organizations and human rights defenders within the framework of the law and, in the interests of transparency, eliminate any undue and arbitrary restriction to funding sources, for example under the pretext of "combating foreign interference" or for the "defense of national interests."<sup>474</sup>
18. Ensure that any intelligence activity that is carried out, especially when a human rights defender is involved or subject to the operation, has the proper prior authorization, with clear limits pre-established by law, and is performed under the supervision of other authorities who periodically issue reports on its activities and results, including accountability.

### ***C. Ensure the Proper Performance of Justice Operators in Accordance with International Human Rights Standards in the Domestic Justice System***

287. When applying criminal law, justice operators must:
  19. Consider, in face of a complaint, if the defendant has the quality of human rights defender as well as the context of the alleged facts, which will help determine whether the complaint was used as a mechanism to hinder the work of human rights defenders.

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<sup>474</sup> FIDH, Annual Report 2013, [Violations of the right of NGOs to funding: from harassment to criminalisation](#), 2013, p.87.

20. Ensure that the authorities responsible for the investigation of crimes collect the necessary evidence to determine the existence of unlawful conduct prior to imposing precautionary measures or making accusations against defenders.
21. Take into account all other international instruments that protect human rights defenders. That is, undertake a conventionality control between domestic norms and the American Convention.<sup>475</sup> Justice operators must ensure the correct application of the law and seek the truth of the facts occurred, acting with professionalism, in good faith, with procedural loyalty, considering both the elements to prove the crime and the participation of the accused in the act, as well as those that may exclude or lessen the criminal responsibility of the accused.<sup>476</sup>
22. To promote that judges strictly abide by the dispositions of criminal law, and observe the greatest rigor in considering whether the behavior of the person incriminated falls within the description of the criminal offense, in order not to incur in the criminalization of the legitimate activities of human rights defenders.<sup>477</sup>
23. Guarantee the right of access to justice, which implies that anyone who is subjected to a judicial proceeding must be able to obtain a final decision from the courts without undue delays arising from the lack of diligence and care.<sup>478</sup>
24. Faced with an abusive and baseless criminal complaint, investigate seriously the individual responsible for promoting such complaint, given that it violates the rights protected in the American Convention and the American Declaration, in order to clarify the facts and punish those responsible, be it an individual or a state agent.
25. Combat impunity regarding attacks on human rights defenders, which implies conducting serious, independent, and transparent investigations to identify the perpetrators and masterminds, prosecute them, and ensure adequate reparations to victims.
26. Ensure that those responsible for law enforcement have sufficient equipment and proper training, are subject to effective civilian oversight, and receive regular training on human rights.

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<sup>475</sup> *Ibidem.*

<sup>476</sup> I/A Court H.R., *Case of Tristán Donoso v. Panama*. Preliminary Objection, Merits, Reparations and Costs. Judgment of January 27, 2009. Series C No. 193, párr.165.

<sup>477</sup> I/A Court H.R., *Case Cruz de las Flores v. Peru*. Merits, Reparations and Costs. Judgment of November 18, 2004. Series C No.115, paras. 81-82.

<sup>478</sup> I/A Court H.R., *Case Yvon Neptune v. Haiti*. Merits, Reparations and Costs. Judgment of May 6, 2008. Series C No. 180, para.83.

## ***D. Avoid Criminal Proceedings of an Unreasonable Length***

288. States should ensure that human rights defenders are not subjected to criminal proceedings that are unnecessarily accelerated or prolonged through the following measures:
  27. Ensure that the criminal proceedings brought against defenders are resolved within a reasonable time, impartially, with special attention to the work they perform, considering that in being subjected to criminal proceedings their work of defense is limited in the sense that they are forced to devote time and resources to their own defense.
  28. Ensure that reasonable time is respected, as well as other guarantees of due process, so that defenders against whom criminal proceedings are initiated are properly heard by a competent, independent and impartial tribunal, previously established by law, where their rights to the presumption of innocence and to appeal decisions that are issued against them are guaranteed.

## ***E. Ensure that any Detention is Carried Out with Strict Adherence to the Right of Personal Liberty***

289. In order to avoid arbitrary detentions, the States in the Americas must:
  29. Ensure that the detention of human rights defenders be brought promptly before a judicial review in order to avoid arbitrary or unlawful detention. Also, they should guarantee detainees' rights by ensuring that the defendant is treated in a manner consistent with the presumption of innocence and ensure that detainees are informed of the reasons for their detention and that they have the minimum guarantees to be heard and to appeal the decision without delay.
  30. Adopt the necessary steps to stop all illegal detentions, as well as the isolation, ill-treatment and other violations of due process that may arise in the context of the detention of a human rights defender.
  31. Review domestic legislation and strictly define the grounds and procedures governing the deprivation of liberty, so that the national laws are compatible with the American Convention and the American Declaration, ensuring that the arrests are made pursuant to a warrant duly issued by judicial authorities. Also instruct police officers and investigative authorities on procedural requirements for detention in order to prevent arbitrary arrests of human rights defenders.

## **F. Eradicate the Misuse of Precautionary Measures**

290. Before applying precautionary measures to human rights defenders in the framework of a criminal investigations, States must:
32. Ensure that such measures meet the standards of the American Convention and the American Declaration, in particular the principles of legality, the presumption of innocence, need, and that it is not arbitrary. In considering these elements where a human rights defender is involved, accord special consideration to the negative effects that could derive from this imposition on his or her defense work, in the framework of their right to defend rights, as well as the right of the victims they represent to obtain justice.
  33. Only issue arrest warrants in response to the results of investigations that have been impartially conducted. Such orders must also be of reasonable length and be specifically related to the facts that has been investigated in order to prevent them from being reactivated later without having any relation with the new offenses for which the person is arrested.
  34. Apply pretrial detention only exceptionally and only in instances in which there is a risk of flight or obstruction of justice, under the principles of legality, presumption of innocence, necessity and proportionality, avoiding its arbitrary, unnecessary, and disproportionate use. By virtue of the foregoing, the detention measure or pre-trial detention must have a precautionary and not punitive character – always directed at pursuing legitimate purposes and reasonably related to the ongoing criminal proceedings. The measure of pre-trial detention cannot become an early penalty nor have general or special preventive purposes attributable to the penalty.<sup>479</sup> In addition, the measure of pretrial detention must: (a) be based on sufficient evidence, (b) be subject to periodic review, and (c) not be prolonged when the reasons for its adoption do not subsist, such as the need to ensure the detainee will not impede the development of investigations, or will not evade justice.<sup>480</sup>
  35. Intensify efforts and act with the necessary political will to prevent the use of pretrial detention as a tool to impede the right to defend rights and ensure that its use is truly exceptional. In this sense, it is essential to send, from the highest levels of government and the administration of justice, an

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<sup>479</sup> I/A Court H.R., *Suarez Rosero v. Ecuador*. Background. Judgment of November 12, 1997. Series C No. 35 para. 77.

<sup>480</sup> I/A Court H.R., *Suarez Rosero v. Ecuador*. Judgment of November 12, 1997. Series C No. 35, para. 77. Subsequently, in other cases as: I/A Court H.R., *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 21, 2007. Series C No. 170, para. 93; *Servellón García et al v. Honduras*. Judgment of September 21, 2006. Series C No. 152, para. 90; *Palamara Iribarne v. Chile case*. Judgment of November 22, 2005. Series C No. 135, para. 198; I/A Court H.R., *Acosta Calderón v. Ecuador*. Judgment of June 24, 2005. Series C No. 129, para. 111; *Tibi v. Ecuador case*. Judgment of September 7, 2004. Series C No. 114, para. 180.

institutional message of support for the rational use of pretrial detention, and the respect of the presumption of innocence.

36. Ensure that the application of bail responds to the criteria of material equality, and does not constitute a discriminatory measure towards persons who do not have the economic ability to pay those amounts, particularly in the case of defenders who often lack the resources to pay excessive amounts of money. Consequently, in cases where the inability to pay has been proven by the defendant, another non-custodial security measure must be used.
37. Avoid applying alternative measures that prohibit the right to assemble, visit certain places or demonstrate as they directly affect the defenders' right to defend human rights, ensuring that to the extent that they are imposed they respond to the precautionary aim of the process, and do not constitute an obstacle that hinders the work of defenders that are subject to prosecution.
38. Adequately regulate the use and application of the precautionary measures different from pretrial detention, and prevent these from being used in order to hinder the work developed by defenders.

## ***G. Adopt Immediate Responses to Processes of Criminalization***

291. To prevent the criminalization of human rights defenders, States must:
  39. Archive legal proceedings against human rights defenders that have been initiated to repress, sanction, and punish the right to defend human rights, and are groundless. In turn, lift any precautionary measure ordered against human rights defenders that has no real legal basis.
  40. Promote appropriate legal actions - with a view to the annulment and revocation of those sentences - in cases where there are human rights defenders with guilty verdicts and it has been verified that they are resolutions punishing those involved for legitimate activities in defense of the rights.
  41. Implement national campaigns for public recognition of the important role that defenders exercise in guaranteeing democracy and the rule of law in society.
  42. If appropriate, initiate disciplinary, administrative or criminal proceedings against justice operators who have broken the law by investigating, issuing interim measures, or wrongly condemning human rights defenders.

43. Strengthen the justice mechanisms and guarantee the independence and impartiality of the judicial operators, which are necessary conditions for the legitimate and non-discriminatory application of the laws.<sup>481</sup>

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<sup>481</sup> See IACHR, *Guarantees for the independence of justice operators: Towards strengthening access to justice and the rule of law in the Americas*, OAS/Ser.L/V/II.Doc.44, December 5, 2013, and UN General Assembly, Human Rights Council, A/HRC/RES/25/14 Integrity of the judicial system, April 10, 2014.