

The UN Definition of Human Rights Defenders: Alternative Interpretative Approaches

Aikaterini Christina Koula*

Abstract

Human rights defenders play a crucial role in promoting the realisation of human rights and, in doing so, are often subject to human rights violations. The article explores who can be a human rights defender and particularly looks at the definition of defenders derived from Article 1 of the Declaration on Human Rights Defenders. The definition is broad and vague, as it concerns anyone who fights for human rights and fundamental freedoms. Recognising that the scope of the Declaration was uncertain, in 2004 the Office of the United Nations High Commissioner for Human Rights published Fact Sheet 29 in an attempt to provide guidance on how to approach it. The Fact Sheet establishes three requirements to be a defender; however, the definition remains problematic. The aim of the article is to show through examples that the requirements are themselves so vague that they could provoke misunderstandings, thereby limiting the effectiveness of the Declaration and to propose alternative interpretative approaches.

Key Words

Human Rights Defenders – definition – Declaration on HRDs – UNCHR Fact Sheet 29 – minimum standards – risk.

1. Introduction

Human rights defenders (HRDs)¹ play a crucial role in protecting and promoting the realisation of human rights. Their actions in improving human rights contribute in an important way to enhancing security and stability and to the promotion of the rule of law and respect for the international human rights framework.² Due to the sensitivity of their work, human rights defenders are potentially exposed to serious human rights violations, including attacks and abuse. In order to address problems that human rights defenders encounter in their daily lives, such as the misapplication of legislation and the impunity for crimes committed against them, as well as to influence government policies, and

* Aikaterini Christina Koula is a Doctoral Researcher and Tutor in Law at Durham University. The author is indebted to Dr. Anashri Pillay for all her feedback and support and to Prof. Aoife O'Donoghue for her insightful comments. She is also grateful to the anonymous reviewers for their valuable comments and suggestions. The usual disclaimers apply.

¹ The most commonly used term is 'human rights defenders', but the abbreviation 'HRDs' is also widely used, as are the terms 'human rights activists' or just defenders.

² Emmanouil Athanasiou, 'The Human Rights Defenders at the Crossroads of the New Century: Fighting for Freedom and Security in the OSCE Area' (2005) 1 Helsinki Monitor 14, 16; Yvonne Donders, 'Defending the Human Rights Defenders' (2016) 34(4) Netherlands Quarterly of Human Rights 282, 282.

powerful stakeholders and civil society organisations working with human rights defenders, it is extremely important to define who can be a human rights defender.

The definition of human rights defenders derives from Article 1 of the United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms;³ commonly known as the Declaration on HRDs, and is interpreted in light of the UN High Commissioner for Human Rights Fact Sheet 29.⁴ Article 1 establishes an activity-based definition, focusing on the activity of promoting human rights, while Fact Sheet 29 introduces three minimum requirements to be a defender.

This definition is considered predominant at the international and regional level. It has been adopted by the UN Special Rapporteur on the situation of human rights defenders and United Nations (UN) bodies as well as the Council of Europe, the European Union, the African Commission on Human's and People's Rights and the Organisation for the American States.⁵ It is worth noting that major civil society organisations working with human rights defenders rely on the UN definition,⁶ even though they are of the view that it is vague and provokes misunderstandings.⁷ Despite the strong acceptance of the definition and the fact that it has been twenty years since the adoption of the Declaration, the definition is still of great interest, as it is still not clear who can be characterised as a human rights defender.⁸

The definition is a necessary tool not only for those working with human rights defenders, such as the UN Special Rapporteur and civil society organisations, but also for the defenders themselves. In order to gain the recognition and protection they deserve, they need to know if they can be characterised as defenders and as result can fall within the Declaration.

This article queries why the definition of human rights defenders deriving from the Declaration, and interpreted in the light of Fact Sheet 29 constitutes a problem and argues that it is related to the vague characteristics of the definition and the misinterpretation of its elements. On this basis, it seeks to provide a critical analysis of the definition, highlighting its flaws and through practical examples to show that a vague definition can impair the effectiveness of the Declaration and the protection of human rights defenders. The article does not aim to introduce a new definition. On the contrary, it acknowledges those elements of the definition that need work and suggests alternative approaches that could facilitate the interpretation of the definition.

³ UN General Assembly, Resolution 53/144 Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, 8 March 1999, UN Doc. A/RES/53/144.

⁴ UN Office of the High Commissioner for Human Rights, Fact Sheet No. 29, Human Rights Defenders: Protecting the Right to Defend Human Rights, April 2004, <<https://www.ohchr.org/Documents/Publications/FactSheet29en.pdf>> accessed 8 June 2019.

⁵ UN Committee on Economic, Social and Cultural Rights, Human Rights Defenders and Economic, Social and Cultural Rights, 7 October 2016, UN Doc E/C.12/2016/2; UN Economic and Social Council, Report Submitted by the Special Representative of the Secretary – General on human rights defenders, Hina Jinali, 23 January 2006, UN Doc. E/CN.4/2006/95; UN Special Rapporteur on the situation of human rights defenders, 'How Are Human Rights Defenders Defined?', <<https://www.protecting-defenders.org/en/content/how-are-human-rights-defenders-defined>> accessed 2 March 2019; Council of Europe Commissioner for Human Rights, Conclusions Of Council Of Europe Commissioner For Human Rights, Mr Thomas Hammarberg: Council Of Europe Colloquy On Protecting And Supporting Human Rights Defenders, 14 November 2006 Doc. CommDH/Speech (2006) 26 and Doc. CommDH (2006)19; European Union, Ensuring Protection-EU Guidelines on Human Rights Defenders" (2004) <https://eeas.europa.eu/sites/eeas/files/eu_guidelines_hrd_en.pdf> accessed 2 March 2019; African Commission on Human and People's Rights Res 69; Organisation for American States, 'Human rights defenders: Support for individuals, groups, and organizations of civil society working to promote and protect human rights in the Americas' Res AG/RES. 2517 (XXXIX-O/09) (San Pedro Sula 4 June 2004).

⁶ Front Line Defenders and International Federation for Human Rights (fidh) are organisations that have been founded and work with the specific aim of protecting human rights defenders and use the definition deriving from the Declaration and Fact Sheet 29. Front Line Defenders, 'The Front Line Defenders Story' <<https://www.frontlinedefenders.org/en/who-we-are>> accessed 8 June 2019.

⁷ *ibid*; World Organisation against Torture 'The Observatory For The Protection Of Human Rights Defenders / OMCT' <<http://www.omct.org/human-rights-defenders/observatory/>> accessed 8 June 2019.

⁸ UN Human Rights Council, Report of Special Rapporteur on the situation of human rights defenders on his mission to Mexico, 12 February 2018, UN Doc A/HRC/37/51/Add.2.

More specifically, the Second Part introduces the definition of human rights defenders on the ground of Article 1 and Fact Sheet 29, laying the foundation for a constructive discussion. Special attention is also paid, in Part 3, to addressing what the status of 'human rights defenders' means, in order to highlight why a clear and coherent definition is necessary to defenders and to governmental and non-governmental organisations. Part 4 is devoted to the problematic aspects of the definition. Each Section of Part 4 represents a flaw. In particular, Section A addresses the broadness of the definition, which leaves states a considerable space to define who is a defender and Section B discusses the three minimum requirements to be a defender that are themselves so vague that they could provoke misunderstandings, thereby limiting the effectiveness of the Declaration. Section C argues that the definition should be considered in combination with the criterion of risk, which is currently not part of the definition and distinguishes a defender from an individual who merely supports human rights. Part 5 offers a conclusion to the analysis.

2. The Definition of Human Rights Defenders

In 1998, the UN General Assembly adopted by consensus the UN Declaration on HRDs. It does not create new rights, but articulates existing human rights and fundamental freedoms. On that basis, the primary aim of the Declaration was to recognise the role of those people contributing to the realisation of human rights, bestow on them legitimacy and recognition within international human rights law, raise awareness and enhance their protection, so that they continue their valuable work. The statement of the then UN Secretary-General Kofi Annan that '[w]hen the rights of human rights defenders are violated, all of our rights are put in jeopardy and all of us are made less safe'⁹ summarised the core idea behind the Declaration.

Declarations and human rights treaties in general, make sense if their subjects can be identified. In regard to the Declaration on HRDs, the definition of the term derives from Article 1, which constitutes the key provision of the Declaration, states that:

Everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels.

Although the right to defend human rights is not a right itself, it could be characterised as a personal or group right in the sense that being a human rights defender is a status that ensures existing rights and establishes the states' responsibility for protection.

The definition deriving from the Declaration is wide, encompassing anyone who fights for human rights and promotes fundamental freedoms. This definition is not the only vague aspect of the Declaration: there are other provisions such Article 13, which could also be regarded as unclear.¹⁰ This lack of clarity can be attributed to the long and difficult negotiations that commenced in 1986 and ended with the adoption of the Declaration in 1998 as well as the subsequent compromises required for the adoption of the Declaration. Although the subject was first mentioned in the UN Commission of Human Rights' Resolution 1980/23 which urged all governments to 'encourage and

⁹ UN Office of the High Commissioner for Human Rights 'Press Statement on the 20th Anniversary of the Declaration on Human Rights Defenders' <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23980&LangID=E>> accessed 2 March 2019.

¹⁰ See for example, K Bennett et al, 'A Research Agenda for the Protection of Human Rights Defenders' (2013) 5(3) *Journal of Human Rights Practice* 401,404; Donders (n 2) 282.

support individuals and organs of society exercising their rights and responsibilities to promote the effective observance of human rights',¹¹ negotiations on drafting the Declaration on HRDs officially commenced in 1986 and were conducted by the Working Group on Human Rights Defenders, which was created by the UN Commission on Human Rights.¹² The states' delegates tried to work by consensus in the Working Group because the draft had to be submitted to the Economic and Social Council (ECOSOC), before it was examined and adopted by the UN General Assembly.¹³ On this basis, articles adopted by consensus were less likely to be challenged.¹⁴ However, the negotiations proved considerably difficult for several reasons. The primary conflict line of the negotiations concerned the ideological confrontation between Western and Eastern states during the Cold War.¹⁵ In addition, the countries of the Eastern bloc considered the promotion of the protection and recognition of human rights defenders to be an anti-Soviet move and therefore attempted to block it.¹⁶ The climate changed significantly after the collapse of the Soviet Union in the late 1980s. Several states previously dependent on the Soviet Union, for instance Czechoslovakia, softened their position and contributed to a new balance within the Working Group.¹⁷

Moreover, at the beginning of the negotiations human rights issues were considered a governmental task at the international and national level.¹⁸ Indicatively, in the first meeting of the Working Group, the German representative stated that '[t]he question of the individual must be seen in the context of principles such as the sovereign equality of States and non-interference in their internal affairs.'¹⁹ This stance was abandoned as the first draft of the Declaration placed emphasis on the protection of the rights of human rights defenders rather than on the rights of states.²⁰

Furthermore, a significant number of developing states, which had remained under colonial rule until the 1960s and 1970s and were marginalised in multilateral economic negotiations, found the opportunity to demonstrate their power in human rights fora. As these newly independent states were often governed by authoritarian regimes and as a result were against the development of additional international obligations,²¹ they used their majority power to control the negotiations, slow down the process and impose their views.²² In contrast, several developed countries, such as Canada and Sweden, from the very beginning invested in the deliberations and facilitated the process, because their aim was to support and strengthen the position of human rights defenders.²³ However, it was unofficially agreed by delegations aiming to strengthen the position of human rights defenders that they would not pass a resolution

¹¹ UN Commission on Human Rights resolution 23 (XXXV) of 14 March 1979.

¹² UN Commission on Human Rights, Decision 18/116, 16 March 1984, UN Doc E/1984/14-E/CN.4/1984/77 para 108.

¹³ H.R Dossier, 'The United Nations Draft Declaration on Human Rights Defenders: Analysis and Prospects' (International Service for Human Rights 1998) 8.

¹⁴ *ibid.*

¹⁵ Janika Spannagel, 'Declaration on Human Rights Defenders (1998)' Quellen zur Geschichte der Menschenrechte <<https://www.geschichte-menschenrechte.de/en/hauptnavigation/schlusseltexte/declaration-on-human-rights-defenders-1998/>> accessed 2 March 2019 3.

¹⁶ *ibid.*

¹⁷ *ibid.*

¹⁸ *ibid.*

¹⁹ UN Commission on Human Rights, Report of the Working Group on a Draft Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, 13 March 1986, UN Doc. E/CN.4/1986/40.

²⁰ Working Group on a Draft Declaration on the Right and Responsibility of Individuals, Groups, and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, Report of the 2nd Session 26-30 January 1987, 6 March 1987, UN Doc E/CN.4/1987/38.

²¹ Henry F. Carey, 'The Postcolonial State and the Protection of Human Rights' (2002) 22 (1&2) Comparative Studies of South Asia, Africa and Middle East 59,61-62; Obiora Okafor, 'International Human Rights Fact-Finding Praxis: A TWAİL Perspective' in Philip Alston and Sarah Knuckey (eds), *The Transformation of Human Rights Fact-Finding* (OUP 2016) 49.

²² *ibid.*, 8, 13.

²³ H.R Dossier (n 13) 8.

at any price and, thus, were ready to renounce it, if the other delegations did not modify their attitude.²⁴ At the same time, there were several hard-line states (some Asian states, Syria and Cuba), which did not want to adopt a draft body of principles on the rights and responsibilities of people promoting and protecting human rights due to their general hostility towards human rights.²⁵ As a result, they coordinated regular interventions, not only to avoid the adoption of the text of principles, but also to weaken it significantly.²⁶ For these reasons, it was difficult to arrive at a consensus and, as a result, the delegations had to make a number of compromises.²⁷

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

However, the scope of Article 1 and the entire Declaration was so uncertain that the Office of the UN High Commissioner for Human Rights produced a research report with the aim of providing guidance on the interpretation and application of the Declaration on HRDs. Fact Sheets are not legally binding, and their purpose is to increase knowledge and provide guidance on human rights related issues.²⁸ In response to the definition of human rights defenders, this article argues that Fact Sheet 29 is the only interpretative tool to approach the definition and is therefore considered part of the definition. In particular, Fact Sheet 29 suggests that a defender should meet three requirements: firstly, a defender should accept the universality of human rights; secondly, his or her arguments should not necessarily be factually or legally correct; and, thirdly, the defender should promote human rights through 'peaceful actions'.²⁹ In short, a human rights defender can be anyone fighting for human rights as long as the requirements of Fact Sheet 29 are met.

Despite the efforts of the UN High Commissioner to provide guidance on the interpretation of the definition of human rights defenders, as will be discussed in detail below, there are still certain characteristics that can be called into question. Most importantly, the definition does not include the risk at which a defender puts his or her life to promote human rights, which, as will be seen later in this article, would help distinguish a defender from an individual who merely respects and supports human rights.

3. What Does the 'Human Rights Defender' Status Entail?

In order to facilitate the implementation of the UN Declaration on HRDs, the Commission on Human Rights asked the UN Secretary-General to establish a special mechanism on human rights defenders.³⁰ Special Procedures (SPs) or Special Mechanisms are international

²⁴ *ibid* 26.

²⁵ Spannagel (n 15) 4.

²⁶ *ibid* 17.

²⁷ Martin A. Rogoff, 'The Obligation to Negotiate in International Law: Rules and Realities' (1994) 16 (1) *Michigan Journal of International Law* 141, 141.

²⁸ P. Alston and R. Goodman, *International Human Rights* (1st edn, OUP 2013) 743; Fact Sheet 29 (n 4) 7.

²⁹ Fact Sheet 29 (n 4) 9, 10.

³⁰ UN Commission on Human Rights, Resolution 2000/61: Human Rights Defenders, 26 April 2000, UN Doc E/CN.4/2000/RES/2000/61.

experts authorised by the UN Human Rights Council to tackle human rights situations.³¹ On this basis, in August 2000, Hina Jilani was appointed by the UN Secretary-General as the first UN Special Rapporteur on the situation of human rights defenders (UN Special Rapporteur on HRDs).³²

The UN Special Rapporteur on HRDs, as all the other UN Special Rapporteurs, is an independent and professional volunteer rather than a UN employee,³³ who is mandated to monitor and report on the situation of human rights by receiving comments, travelling to countries, and making recommendations to governments.³⁴ He or she also has the authority to receive and respond to individual complaints on human rights abuses prior to the exhaustion of domestic remedies and apply treaty law as well as customary international law when he or she is called upon to handle an individual complaint.³⁵ In essence, the mandate establishes two functions: the fact-finding activity and the reporting function, which is said to give 'sense and meaning to the fact-finding'.³⁶ Despite the independent nature of their work, Special Rapporteurs have strong affiliation to the UN instruments; as a result, they travel and write their reports under the auspices of the UN.³⁷ In practice, Special Rapporteurs also carry out another important activity, namely contributing to the development of international human rights law. They essentially monitor the implementation of soft law instruments and, through their reports, which are sometimes reaffirmed by the General Assembly, enlarge the scope of human rights rules.³⁸

Special Mechanisms, such as the Special Rapporteur on HRDs and the Human Rights Unit,³⁹ have been established by the Organisation of African Unity (African Union) and the Inter-American Commission on Human Rights respectively⁴⁰ with functions similar to those of the UN Special Rapporteur on HRDs. It is also of significance that the Declaration establishes a prime responsibility on states to ensure, through legislative and administrative initiatives, that the rights of human rights defenders are guaranteed at national level.⁴¹ Undoubtedly, national human rights institutions (NHRIs) play a vital role in the protection of activists.⁴² They have at their disposal protective tools, such as complaints procedures, visits and recommendations, with which they contribute to the development and the implementation of targeted measures.⁴³ Moreover, there are a number of non-governmental organisations

³¹ Today, the Human Rights Council oversees 43 thematic mandates for which it has established SPs. See Marc Bossuyt, 'The Development of Special Procedures of the United Nations Commission on Human Rights' (1985) 6 Human Rights Law Journal 183; Elvira Dominguez-Redondo, 'The History of Special Procedures: A "Learning by Doing" Approach to Human Rights Implementation' in Aoife Nolan, Rosa Freedman and Thérèse Murphy, *The United Nations Special Procedures System* (Nijhoff 2017).

³² UN Secretary-General, Press Release: Secretary General Names Hina Jilani, Pakistan, as Special Representative on Human Rights Defenders, 18 August 2000, SG/A/743/HR4491.

³³ Surya P. Subedi, 'Protection of Human Rights through the Mechanism of UN Special Rapporteurs' (2011) 33 Human Rights Quarterly 201, 216.

³⁴ UN Commission on Human Rights 'Human Rights Defenders Res 61: Human Rights Defenders, 26 April 2000, UN Doc E/CN.4/2000/RES/2000/61; UN Human Rights Council 'Institution-Building of the United Nations Human Rights Council Res 5/1' 18 June 2007, UN Doc A/HRC/RES/5/1.

³⁵ UNCHR Resolution 2000/61 (n 34).

³⁶ Ingrid Nifosi 'The UN Special Procedures in the field of human rights. Institutional history, practice and conceptual framework' (2017) 2 Deusto Journal of Human Rights 131, 146, 148.

³⁷ Joanna Naples-Mitchell, 'Perspectives of UN Special Rapporteurs on Their Role: Inherent Tensions and Unique Contributions to Human Rights' (2011) 15 (2) The International Journal of Human Rights 232, 234.

³⁸ *ibid.*

³⁹ Organisation of African Unity (African Union) 'Resolution on the Protection of Human Rights Defenders in Africa' African Commission on Human and People's Rights Res 69 (Banjul, Gambia 21 May to 1 June 2004).

⁴⁰ Organization of American States 'Human Rights Defenders in the Americas, support for the individuals, groups, and organisation of civil society working to promote and protect human rights in the Americas' AG/RES. 1671 (XXIX-O/99) (Washington DC 7 June 1999).

⁴¹ Declaration on HRDs (n 3) art 2.

⁴² Gillian Triggs, 'National Human Rights Institutes as Human Rights Defenders' (2016) 25 Human Rights Defender 9, 9; Asmara Nababan, 'To Protect the Defenders Doing the Most Possible, Continuing to Do What Has to Be Done' (2008) 26(1) Netherlands Quarterly of Human Rights 139, 143.

⁴³ UN General Assembly, 'Report of the Special Representative on the situation of human rights defenders', 16 January 2013, UN Doc A/HRC/22/47; UN General Assembly, 'Report of the Special Representative on the situation of human rights defenders', 23 December 2013, UN Doc A/HRC/25/55; UN Human Rights Council Res 13/13 (2010) UN doc A/HRC/RES/13/13 para 3.

(NGOs), such as Front Line Defenders and Protection International that are committed to protecting and supporting human rights defenders by providing international advocacy and ensuring the practical security needs of defenders.⁴⁴ In essence, all these mechanisms are devoted to the protection of human rights defenders.

Human rights defenders enjoy the same rights as all individuals on the basis of international and regional treaties. In addition, despite the fact that the aforementioned Special Mechanisms for the protection of human rights defenders are not human rights enforcement mechanisms, they bring the violations committed against defenders to the fore and follow a 'name and shame' policy to increase state compliance.⁴⁵ In essence, they provide extra protection to defenders.

The logic behind this extra protection for human rights defenders is to provide a more efficient and faster protection for people who risk their lives to promote human rights. In particular, given their special status, mere protection under global and regional human rights treaties is insufficient to ensure their effective and immediate protection. Given the excessive volume of cases brought before treaty bodies and the equal importance of each case,⁴⁶ abuses against defenders are unlikely to be prioritised. For that reason, the Mechanisms devoted to the protection of human rights defenders offer training to defenders, provide material and psychological support to them, raise public awareness of their status and situations, and, most importantly, exert pressure on governments to comply with their international human rights obligations and the Declaration on HRDs. Furthermore, treaty Mechanisms are not as familiar with the trends in the violations committed against defenders as those Mechanisms established for this purpose were. In this sense, the reports of these Mechanisms can offer valuable guidance with respect to human rights enforcement mechanisms at the international and regional level when they deal with cases involving human rights defenders.

In order to ensure and promote the protection of human rights defenders, the Mechanisms devoted to their protection must be able to identify them. Therefore, the definition of human rights defenders contained in Fact Sheet 29 is a necessary tool for dealing with the number of defenders' cases and for providing effective protection for defenders. At the same time, defenders themselves must know if they fall within the meaning of 'human rights defenders' so as to seek protection through these Mechanisms.

Failure to have a clear definition has consequences for human rights defenders as well as for the Special Mechanisms that are called on to deal with cases involving defenders. More specifically, if human rights defenders do not know whether they fall within the definition and are entitled to make use of special mechanisms, they may be reluctant to report abuses and seek protection. That could render their work more challenging and make some defenders cease their activities, which would constitute a serious blow to the realisation of human rights. In a similar vein, if competent NGOs and Special Mechanisms are unable to distinguish defenders at risk who need protection from those who are not defenders, they may mistakenly get involved in cases that do not concern human rights defenders. As a consequence, that could delay the cases of real defenders in need of protection, which would also have an impact on the promotion of human rights. However, it is noteworthy that there are international and regional mechanisms, such as the Human Rights Committee, the Committee against Torture, and the Council of Europe Commissioner for Human Rights, that seem to be aware of the term 'human rights defender', as they use it in their official documents.⁴⁷ It is a promising sign that these mechanisms are able to identify human rights

⁴⁴ M. Lawlor and A. Anderson, 'Role of International Organizations should be to support Local Defenders' (2014) 11(20) SUR-International Journal of Human Rights 365, 368.

⁴⁵ Naples-Mitchell (n 37) 237.

⁴⁶ Nigel S. Rodley, *The Role and Impact of Treaty Bodies* (OUP 2013) Ch 26.

⁴⁷ See UN Human Rights Committee, 'Concluding observations on the Gambia in the absence of its second periodic report', 30 August 2018, UN Doc. CCPR/C/GMB/CO/2 paras 39 (c) and 40 (c); UN Human Rights Committee, 'Concluding observations on the second periodic report of Burundi', 21 November 2014, UN Doc. CCPR/C/BDI/CO/2

defenders, but a clearer definition will ensure that those bodies understand the definition properly and do not exclude anyone falling within the term.

4. Problematic Aspects of the Definition under The Declaration and Fact Sheet 29

A. *The Broadness of the Definition*

According to the Declaration's Article 1, anyone can serve as a defender of a right and fundamental freedom at any given time. As a result, individuals, groups of persons and organisations can fall within the classification of 'human rights defenders'. Notably, the Declaration makes the activity of promoting human rights the only characteristic of a defender. This activity-based approach allows for a wide definition, which accommodates all individuals carrying out human rights activities. However, this approach leaves two main issues open: the period of activity and the motives of human rights defenders.

Firstly, this article argues that the period of activity should not play any role in defining a defender and as a result an individual could be regarded as a human rights defender in relation to a specific event, or because he or she promotes and protects human rights occasionally or throughout her whole life.⁴⁸

The first part of Article 1's definition makes sense, provided one bears in mind that people who have occasional links with human rights activities can be characterised as human rights defenders. For instance, a poet may not generally be a defender. However, the poet could act as such, if he or she writes a poem that condemns the human rights violations conducted in his or her country. If that poet is threatened and subject to severe human rights violations because of his or her actions, then the poet could be referred to as a defender. Nevertheless, in order to justify this position, it is important to focus on the action, which is sufficient to cause problems and put the poet in danger, despite the fact that the danger stems from a single event or act.

On the other hand, one can argue that isolated activities are not sufficient to make a person a defender on the basis that a person should have a consistent human rights based approach over time in order to be regarded as a defender.⁴⁹ This position excludes from the definition individuals fighting for human rights occasionally or only once. For that reason, the argument here is that it is important to consider if the activity of an individual is able to lead to the violation of his or her fundamental human rights, regardless of the period of activity. This point is inevitably linked with the criterion of risk at which an individual puts her or his safety to promote human rights, which will be explored below. In other words, 'instantaneous' and 'occasional' defenders who could be exposed to abuse and other violations, as the poet exemplified above, should fall under the term 'human rights defender' and receive the protection of the Declaration.

para 20; UN Committee against Torture, 'Concluding observations on the second periodic report of Rwanda', 21 December 2017, UN Doc. CAT/C/RWA/CO/2 para 53 (a) and (b); UN Committee against Torture, 'Concluding observations of the Committee on the special report of Burundi requested under article 19 (1) in fine of the Convention', 9 September 2016, UN Doc. CAT/C/BDI/CO/2/Add.1 paras 3, 23,24 and 25; Council of Europe Commissioner for Human Rights, 'Third party intervention by the Council of Europe Commissioner for Human Rights under Article 36, paragraph 3, of the European Convention on Human Rights Application ECODEFENCE and others v. Russia and 48 other applications no 9988/13', 5 July 2017, CommDH(2017)22 paras 3, 4, 6, 19, 21, 24 and 35.

⁴⁸ UN Special Rapporteur on the situation of human rights defenders, 'How Are Human Rights Defenders Defined?' <<https://www.protecting-defenders.org/en/content/how-are-human-rights-defenders-defined>> accessed 2 March 2019.

⁴⁹ L. Erugen Fernandez and C. Patel, 'Towards Developing a Critical and Ethical Approach for Better Recognising and Protecting Human Rights Defenders' (2015) 16 (7) *The International Journal of Human Rights* 896, 900.

Secondly, with respect to the motives of the defender, one could also say that a person working for a human rights non-governmental organisation should not be considered to be a defender, since he or she is contracted to promote human rights. However, any individual who fights for the human rights of other people must be entitled to the status of human rights defender. Thus, it is necessary to focus on the consequences to rather than the motives of individuals.⁵⁰ Regardless of the motives, these individuals are willing to put their safety on the line by protesting against violations of, and fighting for, human rights. Undoubtedly, their activities also make a difference in terms of moving human rights forward. Therefore, an individual who promotes human rights on a non-profit basis is no more of a human rights defender than someone who is paid to undertake the role. Should anyone risk his or her freedom, livelihood and life to fight for human rights, then he or she meets one of the most fundamental characteristics of a defender, as is analysed later in the article.

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

The broadness of the definition in Article 1 is not a problem in itself, as it understandably recognises that anyone may act as a human rights activist. Nonetheless, the wide definition in conjunction with the vague guidance provided by Fact Sheet 29 leaves states a dangerous level of discretion in deciding who is considered a defender. Vague legislative provisions are open to different interpretations, which allow either the implementation of judicial mechanisms, or the filling of gaps by states and powerful stakeholders through their own interpretation, depending on their particular interests.⁵¹ In particular, certain categories of activists, which oppose government policies or condemn human rights violations, can be seen as a threat to state practices. For that reason, states may rely on the vague definition in order to be able to exclude their opponents from being considered as human rights defenders. For example, the absence of a clear definition of human rights defenders and the failure to establish a definition of the term 'terrorism', allowed the American authorities to characterise animal activists who damaged property or caused a loss of profits to an animal enterprise as terrorists.⁵² Similarly, there is a strong chance that a number of defenders may not be recognised under the umbrella of the Declaration on HRDs.

Importantly, the choice of a broad definition is not accidental, as a more detailed definition would leave human rights defenders out of term 'human rights defender'.⁵³ As a result, the broadness of the definition ensures that every individual can be included, providing that they fight for human rights.⁵⁴ However, the unclear requirements are open to different interpretations, which, in combination with the absence of an official definition, provokes misunderstandings concerning the implementation of the Declaration,⁵⁵ thus limiting its effectiveness. Even though there are very good reasons for supporting such a broad definition, to avoid confusion, the elements of the definition need to be clear.

⁵⁰ Walter W. Cook, 'Act, Intention and Motive in the Criminal Law' (1917) 26 (8) Yale Journal 645, 645; Whitley R. P. Kaufman, 'Motive, Intention and Morality in Criminal Law' (2003) 28 (2) Criminal Justice Review 317, 317.

⁵¹ G. Keil and R. Poscher, *Vagueness in the Law* (1st edn, OUP 2016) 9.

⁵² Animal Enterprise Terrorism Act (AETA) of 2006, Pub.L 109-374, 18 USC s 43 (United States); Emma Marris, 'Animal Rights "Terror" Law Challenged' (2010) 466 Nature 424; Ed Pilkington, 'Animal Rights "Terrorists"? Legality of Industry-Friendly Law to be Challenged' (*the Guardian*, 2018) <<https://www.theguardian.com/us-news/2015/feb/19/animal-rights-activists-challenge-federal-terrorism-charges>> accessed 2 March 2019.

⁵³ International Service for Human Rights (ISHR), Model Law for the Recognition and Protection of Human Rights Defenders, (2016) 2 <https://www.ishr.ch/sites/default/files/documents/model_law_full_digital_updated_15june2016.pdf> accessed 2 March 2019.

⁵⁴ Commonwealth Human Rights Initiative, 'Silencing the Defenders: Human Rights Defenders in the Commonwealth', (CHRI 2009) 11.

⁵⁵ Athanasiou (n 2) 16.

The clarity of the definition is extremely important not only to governments but also to non-state actors such as businesses. For instance, Adidas Group has adopted a longstanding policy of non-harm and non-interference in connection with the activities of defenders, including those who actively speak out against Adidas businesses. In a 2016 report, Adidas highlighted the absence of an accurate definition of human rights defenders under the Declaration, stating that this made the protection of defenders and the promotion of their work difficult, as it is not clear who is a defender.⁵⁶ Thus, a clear definition will provide significant guidance on the interpretation of the term and will not allow states and non-state actors to interpret the definition according to their own interests.

In addition, a clear definition is important for defenders, since it would enhance their capacity to ensure respect for the rights to which they are entitled as individuals as well as defenders. If they fall under the definition of human rights defenders, they receive the international recognition they deserve; and can also make use of the protective mechanisms available to defenders and allow the defenders to seek funding and training. In other words, human rights defenders need to have a clear identity and take advantage of those mechanisms dedicated to their protection, so that they can keep contributing to the realisation of human rights.

B. Criticisms of the Minimum Standards under Fact Sheet 29

The Declaration on HRDs implies that defenders have rights, as well as responsibilities, as set out in Articles 12 and 18. In particular, Article 12 states that: '[e]veryone has the right, individually and in association with others, to participate in peaceful activities against violations of human rights and fundamental freedoms', while Article 18 provides that '[e]veryone has duties towards and within the community, in which alone the free and full development of his or her personality is possible'. Therefore, a defender should meet all the minimum standards that are stated in Fact Sheet 29 or at least act consistently with them at all times. This section considers those responsibilities in the context of identifying who constitutes a HRD.

(i) Accepting the Universality of Human Rights

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

For this reason, the first standard is not useful in cases where individuals resist adopting particular human rights because of cultural and religious beliefs. In other words, the application of this criterion would leave individuals who act in particular way within a socio-political context outside the Declaration.⁵⁷ Therefore, it is essential to see the 'universality' of human rights as an individual's consistent willingness to fight and react to any human rights violations. For example, in Saudi Arabia, where *Sharia*

⁵⁶ Adidas Group 'The Adidas Group and Human Rights Defenders' (June 2016) <https://www.adidas-group.com/media/filer_public/f0/c5/f0c582a9-506d-4b12-85cf-bd4584f68574/adidas_group_and_human_rights_defenders_2016.pdf> accessed 2 March 2019 1; Michael Ineichen, 'Protecting Human Rights Defenders: A Critical Step Towards a More Holistic Implementation of the UNGPs' (2018) 3 (1) Business and Human Rights Journal 97, 100; UN General Assembly, Report of Special Rapporteur on the situation of human rights defenders, 19 July 2017, A/72/170.

⁵⁷ K Bennett et al (n 10) 404.

(Islamic Law) applies, some men deny that women have equal rights because of their religious beliefs, but the same men have no hesitation in protesting and putting their safety on the line because of their activism against the government's corruption;⁵⁸ these men can be defined as human rights defenders. The fact that they are willing to fight for particular human rights is crucial in determining them as defenders. However, individuals who protest against abuses, but resist the adoption of other human rights violently, cannot be referred to as defenders. This position is correct, as is analysed below, because defenders must be peaceful and not violate human rights. In essence, it is not the denying that is incompatible with the first standard but, rather, any violent action comes from that.

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

In the context of this criterion, it is interesting to consider whether an individual or a group of individuals that promotes the right of hate groups to free speech falls within the definition of human rights defenders. For instance, the American Civil Liberties Union (ACLU), which is a NGO whose mission is 'to defend and preserve the individual rights and liberties guaranteed to all people in this country by the Constitution and laws of the United States',⁵⁹ has been accused of defending the rights of neo-Nazis, especially following their defence of a white nationalist rally organised by a small group of neo-Nazis, at Emancipation Park in Charlottesville in 2017,⁶⁰ where an individual was killed.⁶¹ The national executive director of the ACLU, Anthony Romero, stated:

We are the premier defenders of freedom of speech and racial justice and the rights of all people in the United States. For almost a hundred years, our mission has been to defend the rights of everyone, even people we hate. And ultimately, this is about making sure the government never has the authority or the ability to censor speech because it finds it loathsome or disgusting.⁶²

Drawing from this example, the article emphasises several relevant points with regard to the first minimum standard set out in the Fact Sheet. First of all, freedom of speech seems to be the most cherished American constitutional right to the extent that it is considered a cultural symbol.⁶³ The main reason behind the prominence of freedom of speech in the United States is a strong preference for liberty over equality.⁶⁴ In other words, free speech is perceived as a right belonging almost entirely to the individual against the state, which must be unlimited. However, it is worth noting that American theory and practice has not always been consistent. For example, despite the importance of freedom of political speech in a democratic society, for much of the twentieth century, laws adopted with the purpose of suppressing communist views were routinely upheld

⁵⁸ Pascal Menoret, 'Repression and Protest in Saudi Arabia' (2016) 101 Middle East Brief 1, 4.

⁵⁹ 'Guardians of Freedom' (*American Civil Liberties Union*, 2019) <<https://www.aclu.org/guardians-freedom>> accessed 2 March 2019.

⁶⁰ Joseph Goldstein, 'After Backing Alt-Right in Charlottesville, A.C.L.U. Wrestles with its Role' *New York Times* (2017) <<https://www.nytimes.com/2017/08/17/nyregion/aclu-free-speech-rights-charlottesville-skokie-rally.html>> 2 March 2019.

⁶¹ *ibid.*

⁶² Scott Simon and Antony Romero, 'ACLU Leader on Defending Hate Groups' (NPR 26 August 2017) <<https://www.npr.org/2017/08/26/546323173/aclu-leader-on-defending-hate-groups>> accessed 26 June 2019.

⁶³ Lee C Bollinger, *The Tolerant Society* (OUP 1986) 76-103.

⁶⁴ Michel Rosenfeld 'Hate Speech in Constitutional Jurisprudence: A Comparative Analysis' (2003) 24(4) *Cardozo Law Review* 1523, 1529; Kevin Boyle, 'Hate Speech- The United States versus the Rest of the World?' (2001) 53(2) *Maine Law Review* 488, 490.

as Constitutional.⁶⁵ The United States have a rich history of debate over hate speech, but the United States Supreme Court has repeatedly held that hate speech falls within the meaning of 'freedom of expression', unless it constitutes an incitement to immediate violence.⁶⁶

The American approach to freedom of speech and particularly to hate speech differs significantly from that of other Western democracies. In particular, the European Court of Human Rights (ECtHR)⁶⁷ has held that 'expressions constituting hate speech, which may be insulting to particular individuals or groups, are not protected by Article 10 of the Convention'.⁶⁸ The Court has reiterated this position in several cases, establishing the principle that hate speech is not protected by the European Convention on Human Rights (ECHR).⁶⁹ In *Karaahmed v Bulgaria*, the Court went a step further saying that the failure to punish and prosecute hate speech can amount to a breach of the ECHR,⁷⁰ but it is hard to argue that this standalone case imposes on States the duty to prosecute hate speech.

The ECtHR case law is aligned with the International Covenant on Civil and Political Rights (ICCPR).⁷¹ More specifically, Article 19 of the ICCPR guarantees the right to freedom of expression in terms similar to the UDHR. It allows absolute protection of the right to hold opinions,⁷² and protects the right to seek, receive and impart information and ideas. Article 19 permits limited restrictions on these rights only where these are a) provided by law; b) for the protection of one of the interests listed; and c) necessary to protect that interest.

The ICCPR also imposes an obligation on States Parties to prohibit hate speech. In particular, Article 20(2) provides that 'advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.' Article 20 has been characterised as being 'among the strongest condemnations of hate speech',⁷³ even though it does not refer to hate speech explicitly, but only to incitement. However, reference to 'incitement to discrimination, hostility or violence' as well as 'advocacy of national, racial or religious hatred' is indicative of the degree of hatred that the Article is concerned with.⁷⁴ The UN Human Rights Committee has held that full and effective compliance with this obligation requires 'a law making it clear that propaganda and advocacy as described therein are contrary to public policy and providing for an appropriate sanction in case of violation'.⁷⁵ This should also apply to both states and non-state actors who 'should themselves refrain from any such propaganda or advocacy'.⁷⁶

⁶⁵ See e.g. *Dennis v United States*, 341 US 494 (1951); *Gitlow v New York*, 268 US 652 (1925); *Debs v United States*, 249 US 211 (1919).

⁶⁶ See e.g. *R.A.V. v City of St Paul*, 505 US 377 (1992); *Snyder v Phelps*, 562 U.S. 443 (2011); *Matal v Tam*, 582 US (2017).

⁶⁷ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended by Protocols 11 and 14) (entered into force 3 September 1953) (ECHR).

⁶⁸ *Jersild v Denmark*, App no 15890/89, (ECtHR 23 September 1994) para 35.

⁶⁹ *Gündüz v Turkey*, App no 35071/97, (ECtHR 4 December 2003) para 51; *Féret v Belgium*, App. no 15615/07, (ECtHR 16 July 2009) para 64; *Jean- Marie Le Pen v France*, App no 18788/09 (ECtHR 20 April 2010).

⁷⁰ *Karaahmed v Bulgaria*, App no 30587/13, (ECtHR 24 February 2018).

⁷¹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

⁷² UN Human Rights Committee, General Comment No. 34 'Article 19: Freedoms of Opinion and Expression, 12 September 2011, UN Doc. CCPR/C/GC/34, para 9.

⁷³ Eric Heinze, 'Viewpoint Absolutism and Hate Speech' (2006) 69(4) *Modern Law Review* 543,544.

⁷⁴ Nazila Ghanea, 'The Concept of Racist Hate Speech and its Evolution over Time' Paper presented at the UN Committee on the Elimination of Racial Discrimination's day of thematic discussion on Racist Hate Speech, 81st Session, 28 August 2012

<<https://www.ohchr.org/Documents/HRBodies/CERD/Discussions/RacistHatespeech/NazilaGhanea.pdf>> accessed 3 June 2019.

⁷⁵ UN Human Rights Committee, General Comment No. 11 'Article 20: Prohibition of propaganda for war and inciting national, racial or religious hatred', 29 July 1983, UN Doc. CCPR/C/GC/11 para 2.

⁷⁶ *ibid.*

The Human Rights Committee has emphasised the close relationship between Article 19(3) and 20(2). Particularly, it has stated that any law seeking to implement the provision of Article 20(2) must also comply with the requirements of Article 19(3).⁷⁷ This position has also been found in the Committee's case law. For example, in *Ross v Canada*, the Human Rights Committee held that a restriction on racist expression had to be justified on the ground of the test set out in Article 19(3) of the ICCPR.⁷⁸

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

A second example relevant to the question of minimum standards and the conduct of human rights defenders is lawyers who defend those accused of terrorism and who become the target of criticism. Particularly, many believe that such lawyers' support terrorism and provide aid and comfort to the enemy', while the defence of people accused of horrific crimes is perceived as an endorsement of those crimes.⁷⁹ As a consequence, lawyers who fight for the rights of those accused of terrorism have been refused entry to the US even for holidays, while they have been characterised as the most-hated people in America.⁸⁰ In fact, those defending the rights of those accused of terrorism, either in the capacity of lawyer or activist, struggle to ensure the right of the accused to a fair trial and other fundamental rights.⁸¹ In other words, they fight to uphold the rule of law against a powerful government and society which may overreach, violating the civil rights of suspects, in an attempt to convict them on the charges of terrorism. The point here is that these individuals do not question the universality of human rights; on the contrary, they fight to promote the human rights of those people who may be subject to civil rights violations due to the brutality of their actions. For that reason, there is no doubt that these individuals deserve the title of human rights defenders in relation to the first standard.

(ii) The Validity of the Arguments Being Presented

The second requirement to be a defender under the Fact Sheet concerns the validity of defenders' arguments. It is not important for a human rights defender to develop valid arguments in order to be a 'genuine' defender.⁸² However, their arguments must generally fall within the scope of human rights law. In other words, the ultimate aim of a defender's activity and argument should be the promotion and protection of human rights.

⁷⁷ *ibid*, para 1.

⁷⁸ UN Human Rights Committee, *Ross v Canada* (736/1997) Merits, 26 October 2000, UN Doc CCPR/C/70/D/736/1997 para 11.1.

⁷⁹ Nancy Hollander, 'Opinion: A Terrorist Lawyer, and Proud of it' (*Nytimes.com*, 26 March 2010) <<https://www.nytimes.com/2010/03/24/opinion/24iht-edhollander.html>> accessed 26 June 2019.

⁸⁰ Sarah Netter, 'Lawyers Who Defend Terrorists, The Most Hated People in America' (*ABC News*, 12 January 2010) <<https://abcnews.go.com/WN/lawyers-defending-terrorists-stress-case-hated-people-america/story?id=9531235>> accessed 26 June 2019; 'Terrorist Suspects' Lawyers Refused Entry to the US' (*vrtnws.be*, 19 September 2018) <<https://www.vrt.be/vrtnws/en/2018/09/19/terrorist-suspects-lawyers-refused-entry-to-the-us/>> accessed 26 June 2019.

⁸¹ Alissa Clare, 'We Should Have Gone to Med School: In the Wake of Lynne Stewart, Lawyers Face Hard Time for Defending Terrorist' (2005) 18 *Georgetown Journal of Legal Ethics* 651, 654.

⁸² Fact Sheet 29 (n 4) 9.

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

For instance, there are a significant number of organisations in Latin America, such as the Civic Council of Popular and Indigenous Organisation of Honduras (COPINH), which advocate environmental and land rights in order to protect rivers, forests, air and the land of the Indigenous people. The organisations perceive the environment as a gift of mother earth and therefore try to defend nature in all possible ways.⁸³ Based on these arguments, they fight for land rights. However, the state and companies whose interests are affected, find the arguments of Indigenous people to be frivolous and deem them wrong and unjust. Murders, threats and intimidation against members of the COPINH have been reported, with the motivation of stopping COPINH's protests.⁸⁴ This article asserts that regardless of whether COPINH's argument is right or wrong, the members of the COPINH deserve to fall within the scope of human rights defenders, since they fight for human rights.⁸⁵

In addition, defenders campaigning on the rights of political prisoners and terrorists may be regarded by the State as supporters of those people and as individuals who share the same belief, and as a result states may argue that these individuals cannot be characterised as human rights defenders.⁸⁶

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

(iii) Peaceful Activities

According to the third requirement under the minimum standards set out in the Fact Sheet, defenders should fight for human rights and protest against violations only through peaceful actions. This 'non-violence' criterion is clearly derived from the Declaration text which provides in Article 12(3) that defenders 'have the right to participate in peaceful activities against violations of human rights and fundamental freedoms'. Moreover, Article 20 does not permit states 'to support and promote activities of individuals, groups of individuals, institutions or non-governmental organisation contrary to the provisions of the Charter of the United Nations'. In other words, the activities of defenders must be conducted peacefully in order to comply with the provisions of the Declaration on HRDs.

As stated, the third criterion requires that defenders should not act in a violent manner when promoting particular rights. For example, defenders protesting against sexual discrimination are not entitled to vandalise public and private properties during a demonstration merely to highlight the importance of their fight. However, it should be

⁸³ 'Civic Council of Popular and Indigenous Organizations of Honduras (COPINH) | Grassroots International' (*Grassroots International*, 2010) <<https://grassrootsonline.org/who-we-are/partner/civic-council-of-popular-and-indigenous-organizations-of-honduras-copin-h>> accessed 27 June 2019.

⁸⁴ International Service for Human Rights Defenders, 'Human rights defender profile: Francisco Javier from Honduras' (15 November 2016) <<http://www.ishr.ch/news/human-rights-defender-profile-francisco-javier-honduras>> accessed 2 March 2019.

⁸⁵ 'COPINH' (*Front Line Defenders*, 2018) <<https://www.frontlinedefenders.org/en/profile/copin-h>> accessed 2 March 2019.

⁸⁶ Fact Sheet 29 (n 4) 9.

acknowledged that there is a likelihood that a peaceful protest could turn violent in response to violent and repressive policing.⁸⁷ Therefore, it is interesting and important to discuss whether or not defenders participating in this kind of demonstration would be excluded from the definition of human rights defenders.

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

Article 2 of the ICCPR establishes the obligation on states to 'respect and to ensure to all individuals within their territory and subject to their jurisdiction the rights recognized in the Covenant without distinction [...]'. In essence, the exercise of violence displayed by state authorities means that the state fails to comply with the obligation of Article 2, as it violates fundamental rights under the Covenant.⁸⁹ That, in turn, allows people to react and defend their rights by themselves. On this basis, Ashworth articulated the opinion that 'where the attack or threat is sudden, the protection of society and its laws is no longer effective, and the individual alone may be left to protect his right to life and physical security'.⁹⁰ Although international human rights law does not establish a right of forcible resistance, forcible resistance may be justified against human rights abuses that threaten to cause a serious and irreparable harm. This limited right to resistance against human rights violations derives from the right to an effective remedy, which also part of Article 2, in the sense that if a human rights violation poses a serious and irreparable threat, resistance may be the only effective remedy available.⁹¹ A more obvious origin of the right to forcible resistance may also be the right to personal self-defence that is considered a general principle of law recognised by nations.⁹²

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

In addition, there are practitioners who express their concerns regarding the difficulties of applying the criterion of 'non-violence' in occupied territories.⁹⁵ In those

⁸⁷ Bennett et al (n 10) 404.

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

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

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

⁹¹ D. Kopel, J. Eisen and P. Gallant, 'The Human Right of Self-Defence' (2008) 22 *BYU Journal of Public Law* 43.

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

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

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

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

regions, demonstrations arise as protest against the occupation, or in response to violations conducted by the regime. They can be organised on the occasion of national days.⁹⁶ However, peaceful protests might be deemed illegal and violent by the ruling regime, in order that the regime can prove the illegal character of the protest and prevent similar actions in the future. In other words, even if someone wants to undertake a peaceful protest and promote human rights in the occupied territory, she could become part of a violent situation.⁹⁷ This would mean they do not meet the third standard and cannot be referred to as defenders.

For example, in Palestine, where people fight against human rights violations such as their right to self-determination, right to life and human dignity, demonstrations play a crucial role in the struggle against abuses. Demonstrations are a chance for confrontation between occupying military forces and Palestinian demonstrators with the former using excessive force with the result that demonstrators turn violent.⁹⁸ However, there are dozens of Palestinians, such as Abdullah Abu Rahme,⁹⁹ who campaign using non-violent protests against the separation barrier, but who have been convicted on charges of participating in violent and illegal demonstrations and throwing stones at Israeli soldiers.¹⁰⁰ Regardless of whether or not the charges of which they were convicted are well-founded, it could be said that the demonstrators want to remain peaceful and only turn violent in response to excessive use of force. Despite the fact that the criterion of peaceful action could not apply to this case, these individuals can be referred to as defenders. For these reasons, in cases where defenders adopt violent actions in response to aggression used by state authorities and within territories in which violence prevails, non-peaceful activities can be justified, and this criterion should be ignored. In any other case, there should be no derogation from a requirement derived from the Declaration.

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

It is a long standing position in political philosophy that 'any individual citizen oppressed by the rulers of the state, has a right to disobey their commands, break their laws, even rebel and seek to replace the rules and change the laws.'¹⁰² This position helps to understand the idea of revolution. In particular, the revolutionary does not accept the present government entirely and tries to establish the rule of law and promote

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

⁹⁷ Jaraisy and Feldman (n 95) 429.

⁹⁸ *ibid*, 423.

⁹⁹ European Union, Statement by the spokesperson of High Representative of the Union for Foreign Affairs and Security Policy on Conviction of human rights defender Abdullah Abu Rahme, 24 August 2010, A 167/10 <https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/116232.pdf> accessed 2 March 2019.

¹⁰⁰ International Solidarity Movement, 'Human rights defender Abdullah Abu Rahma [sic] arrested and detained' (15 May 2016) <<https://palsolidarity.org/2016/05/press-release-human-rights-defender-abdullah-abu-rahma-arrested-and-detained/>> accessed 2 March 2019; Human Rights Watch, 'Israel: Activist convicted after unfair trial' (17 April 2015) <<https://www.hrw.org/news/2010/09/08/israel-activist-convicted-after-unfair-trial>> accessed 2 March 2019.

¹⁰¹ A. KelkMager, B. Nasson and R. Ross, *The Cambridge History of South Africa* (1st edn, CUP 2011) 340-350, 360-369; Nelson Mandela Foundation, 'Foundation remembers Sharpeville massacre victims' (10 March 2010) <<https://www.nelsonmandela.org/news/entry/foundation-remembers-sharpeville-massacre-victims>> accessed 2 March 2019.

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

individual and civil rights.¹⁰³ Non-acceptance of the present legal system allows any kind of violence in an attempt to restore democracy and human rights. It is said that international law accepts that a revolution may be a lawful exercise of a right to resistance provided that the right to self-determination is forcibly denied owing to colonial rule, unlawful alien occupation or racist regime.¹⁰⁴ In essence, an organised and violent resistance is justified as a measure of last resort.¹⁰⁵ It is worth noting that, according to Hessbruegge, this rule seems to apply to the struggle against Apartheid and Israel's occupation of Palestinian territories.¹⁰⁶ On this basis, individuals fighting for establishing the rule of law and human rights should be characterised as defenders, despite the violence and disobedience.¹⁰⁷ The violence they commit, as a reaction to abuses, must be the only means by which they manage to restore democracy and promote the realisation of human rights in a hostile environment.¹⁰⁸

The argument put forward in this part is that the use of violence by either states or human rights defenders is by no means condoned in international human rights law, but the defender should not be stripped of all protection on the basis she or he took violent action to promote human rights. Therefore, people making a significant effort to promote and establish democracy should be, in principle, human rights defenders.

C. The Absence of the Criterion of Risk to Safety and Violations of Fundamental Human Rights

Taking Article 1 into consideration, the guidelines of Fact Sheet 29 and the analysis to date, one can argue that a human rights defender can be any person or group of persons working to promote human rights. Furthermore, the individual must meet the three minimum standards required to be a defender as discussed in sub-section (i) to (iii) above. However, in addition to the apparent flaws in the minimum standards, the definition fails to include the most important element; the risk to the safety, livelihood and freedom of the defenders in order to protect and promote human rights and the abuses against them because of their work. Although the Special Rapporteur on HRDs constantly reports serious human rights violations and abuses against defenders and sometimes against their families, and names them as 'human rights defenders at risk',¹⁰⁹ this threat, as well as any kind of abuse against them, is not part of the definition of human rights defenders. However, the use of the word 'strive' in Article 1 of the Declaration could imply that defenders try very hard to promote human rights against all kind of difficulties. However, neither the Declaration nor Fact Sheet 29 specifically includes the threat to safety and livelihood and other abuses to which defenders are often subject as part of the definition of being a human rights defender.

The threat to safety, life and livelihood and violations of other fundamental human rights, as a consequence of defenders' activity, is the element which distinguishes

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

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

¹⁰⁵ Summares, *ibid*.

¹⁰⁶ Hessbruegge (n 93) 317; Paul A. Beckett, 'Algeria vs. Fanon: The Theory of Revolutionary Decolonization and the Algerian Experience' (1973) 26 (1) *The Western Political Quarterly* 5.

¹⁰⁷ Beckett, *ibid*.

¹⁰⁸ Hessbruegge (n 93) 317; Summares (n 104) 458.

¹⁰⁹ UN General Assembly, Report of the Special Representative on the situation of human rights defenders, 22 February 2016, UN Doc A/HRC/31/55/Add; UN General Assembly, Report of the Special Representative on the situation of human rights defenders, 1 February 2016, UN Doc A/HRC/31/55; UN General Assembly, Human Rights Defenders, 4 August 2010, UN Doc A/65/223; UN Economic and Social Council, Report Submitted by the Special Representative of the Secretary-General on human rights defenders, Hina Jinali, 15 January 2004, UN Doc E/CN.4/2004/94.

a human rights defender from an individual who merely supports human rights. A defender risks his or her freedom, life, family and job to promote human rights and often he or she is subject to major human rights abuses. Therefore, it is imperative for defenders to fall under the Declaration on HRDs, which recognises their role and the sensitive and risky nature of their work and offers a suitable means of protection. Therefore, including any person supporting human rights may only cause confusion over who is actually a defender and extends the Declaration's recognition and protection to everyone. For this reason, the criterion of risk and human rights violations plays a vital role in determining who is a defender, since it makes clear who is in danger and therefore needs protection and recognition.

Of great importance is that the aim of the Declaration is to focus on defenders' potential sacrifices and recognise their work. Therefore, this criterion is used to distinguish individuals risking their lives, livelihoods and safety in order to promote human rights from other individuals who merely support human rights.

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

This criterion is also the element which is used to identify an individual as a defender in the case of changes in circumstances. For example, a poet who wrote a poem about the violations of human rights many years ago could suddenly find herself being prosecuted for that poem, if the government has changed and now targets those who had condemned previous actions.

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

From a pragmatic and legal perspective, the severity of the abuses and threats must not be the cardinal feature of this criterion. In Turkey, a significant number of academics lost their jobs at the universities due to their prominent standing in the academia and their constant condemnations of human rights violations.¹¹⁰ In the context of academic freedom, which includes inter alia freedom of teaching and discussion,

¹¹⁰ 'Turkey: Government Targeting Academics' (*Human Rights Watch*, 14 May 2018) <<https://www.hrw.org/news/2018/05/14/turkey-government-targeting-academics>> accessed 26 June 2019.

freedom to express freely their opinion and freedom from institutional censorship,¹¹¹ many academics were critical of the government and signed the Peace Declaration, a petition denouncing attacks on Kurds, in January 2016.¹¹² The state, being unable to control academics and the freedom of academic expression, expelled more than 4,000 academics from universities in response.¹¹³ In contrast, in Pakistan, one of the most challenging countries for human rights defenders, Salman Haider is a defender who has been working on minority rights and protesting against forced disappearances. On 4 January 2017, he was reported missing in Islamabad and 24 days later he was released without commenting on his disappearance.¹¹⁴ In essence, multiple violations, from losing a job to enforced disappearances and torture are all sufficient reprisals to meet the criterion of risk and characterise someone as a human rights defender.

According to Fact Sheet 29, an architect who chooses to design her construction in a way that offers specific support to relevant human rights,¹¹⁵ such as the right to a healthy environment and for this reason uses eco-friendly materials, could be referred to as a defender.¹¹⁶ The argument posited in this article is different from the position presented in Fact Sheet 29 in the sense that she does not need recognition just because she is conducting her job in a way which supports human rights. Nevertheless, this architect could be characterised as a defender, provided that her insistence on eco-friendly methods of construction put her in danger of being harmed or stigmatised within the society.

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

5. Conclusion

This article focuses on the definition of human rights defenders and argues that the decision to take a wide approach under the UN Declaration on Human Rights Defenders and its interpretive Fact Sheet 29 could be counterproductive for the protection of defenders. Despite the fact that a broad definition can accommodate all profiles of human rights defenders, the definition itself is so broad that it permits a considerable vagueness over who can be a defender. Additionally, the minimum requirements set out in the Fact Sheet leave important and complicated issues unaddressed, causing further confusion.

Several practical examples have been used to show that there area variety of cases in which the definition represents a problem, proving that it is difficult to apply to all cases and, furthermore, is open to different interpretations in certain circumstances. The article also highlights the absence of the criterion of risk, which distinguishes those

¹¹¹ R. Quinn and J. Levine, 'Intellectual-Human Rights Defenders and Claims for Academic Freedom under Human Rights Law' (2014) 18 (7-8) *The International Journal of Human Rights* 898, 901.

¹¹² Ibrahim Natil, 'Turkey's Foreign Policy Challenges in Syrian Crisis' (2016) 27 *Irish Studies in International Affairs* 75, 79.

¹¹³ Sibel Hurtas, 'The collapse of Turkish academia' *Al-Monitor* (13 February 2017) <<http://www.al-monitor.com/pulse/originals/2017/02/turkey-academics-purges-collapse-of-academia.html>> accessed 2 March 2019.

¹¹⁴ 'Harassment of Salman Haider' *Front Line Defenders* (3 February 2017) <<https://www.frontlinedefenders.org/en/case/disappearance-salman-haider>> accessed 2 March 2019.

¹¹⁵ Fact Sheet 29 (n 4) 7.

¹¹⁶ *ibid.*

who put their safety and livelihood on line to promote human rights from those who merely support human rights.

Although some contradictions pointed out could not be resolved easily, the article is meant to underline the flaws in the current definition, suggest alternative approaches and encourage the Special Rapporteur on HRDs, state authorities and civil society organisations working with human rights defenders to consider those problematic elements, when they interpret the definition and implement the Declaration. There is still a considerable gap in research on the definition of human rights defenders. For that reason, any definition needs to be informed by doctrinal as well as empirical research including interviews with human rights defenders. This would ensure that the definition is responsive to the needs and reality of defenders, contributing more to their protection. In essence, if all Mechanisms dedicated to the protection of human rights defenders take the proposed interpretative approaches into account, interpret it accordingly and consider the views of human rights defenders, a clear definition will come out of practice, which, in turn, will contribute to a more effective implementation of the Declaration on HRDs.