

Submission to the Special Rapporteur on Human Rights Defenders:

Creating and maintaining an enabling environment for human rights defenders

Background to this submission

This submission is made by the International Service for Human Rights in response to a request for information from the Special Rapporteur on Human Rights Defenders on the elements of a safe and enabling environment for the activities of defenders, and what States and other actors should do to ensure these features are in place. It is envisaged that this information will be used to inform the Special Rapporteur's next report to the UN Human Rights Council in March 2014.

ISHR welcomes the focus of the Special Rapporteur's next report. The obligation to create and maintain a safe and enabling environment is primarily an obligation of States and is essential to ensuring that human rights defenders can effectively undertake their important and valuable work to promote human rights, democracy and the rule of law. ISHR considers that the Special Rapporteur's report could provide valuable guidance and assistance to States and other actors in discharging their obligations in this regard.

ISHR also welcomes the focus of the report as a timely response to continuing attacks and restrictions, including of a legislative nature, on the work of human rights defenders in all regions of the world.

ISHR's submission focuses on some elements of an enabling environment, but is not intended to be exhaustive. In particular, the submission considers:

- the role of laws and policies which specifically recognise and protect the work of human rights defenders in creating and maintaining a safe and enabling environment for that work;
- the right of unhindered access to international bodies, and the obligations of both States and international bodies in that regard;
- the particular recognition and protection needs of vulnerable groups of defenders, specifically women human rights defenders and those working on issues of sexual orientation and gender identity;
- the importance of high-level political support for, and public education regarding, the work of human rights defenders; and
- the obligations of non-State actors, especially corporations.

The submission concludes with recommendations as to the steps and measures that States, the United Nations and other relevant actors should take to create and maintain a safe and enabling environment for the valuable work of human rights defenders.

What elements constitute a safe and enabling environment for human rights defenders?

1. RECOGNITION AND PROTECTION OF DEFENDERS' RIGHTS IN NATIONAL LAWS AND POLICIES¹

Protecting the rights of human rights defenders in national legislation is an important aspect of creating and maintaining an enabling environment for their work.

Despite the fact that 15 years have passed since the General Assembly adopted the Declaration on Human Rights Defenders by consensus, relatively few States have moved to fully incorporate its provisions into domestic law. As answers to a 2010 questionnaire by the Special Rapporteur reveal, a number of States maintain that defenders' rights are adequately protected under more general measures, constitutional or otherwise, regarding the security and equality of everyone.²

The difficulty with these arguments, however, is that they ignore strong evidence that where human rights are specifically recognised and protected in national law they are more likely to be respected and realised in practice. Put another way, while the specific recognition and protection of human rights in law is not sufficient to ensure the realisation of rights, the absence of specific laws makes the realisation of specific rights much less likely.³

The arguments against specificity also ignore important normative and educative benefits of specific laws and policies in this context—including that specificity has functions beyond proscribing and prescribing behaviour and is a key aspect of building a safe and enabling environment.

A State's responsibility to promote and protect the rights of defenders includes creating and sustaining a safe and enabling environment⁴ for their work. In that regard, the Special Rapporteur has noted that the primary element of an enabling environment is the enjoyment of the rights and freedoms set out in the Declaration on Human Rights Defenders. Other relevant elements include the legislative context, policies related specifically to human rights defenders, perceptions of human rights defenders, and open support for defenders on the

¹ This section of the submission is adapted from and can be cited to: Sinclair, M (2013). *Ending Reprisals: The role of national laws and policies in protecting those who cooperate with the United Nations*, International Service for Human Rights, http://www.ishr.ch/sites/default/files/article/files/isshr_reprisals_report-09_13_updated.pdf

² Human Rights Council Report of the Special Rapporteur on the Situation of Human Rights Defenders on the Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development (30 December 2009) UN Doc [A/HRC/13/22](#).

³ See e.g. Human Rights Committee, General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc [CCPR/C/21/Rev.1/Add.13](#) (26 May 2004), para 13. See also Emilie Hafner-Burton, *Making Human Rights a Reality* (Princeton University Press, 2013); and Australian Public Service Commission, *Changing Behaviour: A Public Policy Perspective* (2007) 29.

⁴ On the concept of the 'enabling environment' see also CIVICUS, '[State of Civil Society 2013: Creating an Enabling Environment](#)' (2013), pg 18. The Council has also urged States to promote a safe and enabling environment in its resolutions on Protection of Human Rights Defenders [A/HRC/RES/13/13](#) (9 April 2010) and [A/HRC/RES/22/6](#) (15 March 2013), Human Rights, Democracy and the Rule of Law [A/HRC/RES/19/36](#) (19 April 2012). The UN High Commissioner has emphasised this obligation as well.

part of public authorities and the political establishment.⁵ All of these elements are more likely to be present where defenders' rights are specifically recognised and protected in national law. This is recognised in the most recent Secretary-General's report on reprisals, which calls on States to take comprehensive 'action at the national level', starting with 'the adoption of appropriate legislation',⁶ and in the most recent Human Rights Council resolutions on the 'Protection of human rights defenders' (22/6) and on 'Cooperation with the United Nations, its representatives and mechanisms in the field of human rights' (24/L.17).

Specific laws contribute to an enabling environment by providing a strong legal basis for those activities

The enabling environment concept provides direct support for an explicit guarantee in domestic law of the rights contained in the Declaration in that, first, the legislative context is central to creating an enabling environment; and, second, that an environment is more likely to be enabling where there are policies related specifically to human rights defenders.

Taking these factors together, specifically guaranteeing the rights and obligations contained in the Declaration contributes to an enabling environment by enhancing the implementation of those rights and obligations, and contributing to defenders' protection by providing a strong legal basis for their activities. In addition, specifically protecting rights contained in the Declaration contributes to an enabling environment by more precisely articulating how broader standards (e.g. freedom of expression) apply in particular to human rights defenders. This leaves less of a margin of discretion or uncertainty about these rights, making them more accessible and more likely to be understood and known by defenders and others, and enabling greater scrutiny of a government's recourse to other national laws as justification for alleged violations.

Specific laws contribute to an enabling environment by demonstrating public support for, and contributing positively to perceptions of, defenders

The enabling environment concept also provides indirect support for an explicit guarantee in domestic law of the rights contained in the Declaration on Human Rights Defenders. This argument draws on two related aspects of the enabling environment, namely: (1) the enabling role of positive perceptions of human rights defenders and (2) the enabling role of open support for defenders on the part of public authorities and the political establishment. The contention here is that a specific articulation of the rights relevant to human rights defenders is not only useful for the legal guarantees provided, but also contributes to the enabling environment by underlining the importance and legitimacy of that work and signalling the State's support for it.⁷

The Special Rapporteur has previously emphasised that, while legislation, policies and institutions are indispensable in creating an enabling environment for defenders, the attitude

⁵ Report of the Special Rapporteur on the Situation of Human Rights Defenders (14 August 2008) UN Doc Annex para 3. See also Report of the Secretary-General on Cooperation with the United Nations, Its Representatives and Mechanisms in the Field of Human Rights (31 July 2013) UN Doc [A/HRC/24/29](#), para 52.

⁶ Report of the Secretary-General on Cooperation with the United Nations, Its Representatives and Mechanisms in the Field of Human Rights (31 July 2013) UN Doc [A/HRC/24/29](#), para 52.

⁷ For a further discussion on the role and importance of notions of legitimacy and value in persuading compliance with and respect for law, see Ian Hurd, 'Legitimacy and Authority in International Politics,' *International Organization* 53, no. 2 (1999): 379–408; Tom R Tyler and Yuen J Huo, *Trust in the Law: Encouraging Public Cooperation with the Police and Courts* (New York: Russell Sage, 2002).

of the political establishment can make a fundamental difference in the effectiveness of those frameworks.⁸ The Special Rapporteur has also stressed that popular support for the work of defenders has in many situations provided a barrier against repression.⁹ Very often, firm public stands in support of human rights defenders can transform a situation of vulnerability for defenders into one of empowerment.¹⁰ In this regard, the Secretary-General has said that States should take measures to prevent intimidation and reprisals by '*publicly supporting activities in defence of human rights* and cooperation with the UN, and by taking measures to *inform the population* about the different ways and means available to cooperate with the UN'.¹¹

Underlying this argument are theories of the 'expressive' functions of laws, i.e. those that go beyond prescribing and proscribing behaviour. Though a full discussion is beyond the scope of this submission, such theories incorporate analyses of social norms to argue that laws shape individual preferences and behaviours by communicating what a government values or what it believes the social norm should be.¹² Human rights laws in particular have expressive and educational roles for, by their nature, they signal the values a particular society stands for.¹³ On that basis, adopting laws explicitly guaranteeing the rights contained in the Declaration on Human Rights Defenders contributes to building an enabling environment by giving those rights specific and authoritative legitimacy, and by building wider societal support to demands for their fulfilment.

2. RIGHT TO UNHINDERED ACCESS TO INTERNATIONAL BODIES

A crucial element of creating a safe and enabling environment for the work of human rights defenders is the right of everyone, individually and in association with others, to unhindered access to and communication with international bodies. This right is enshrined in the Declaration on Human Rights Defenders. It is comprehensively discussed in the Special Rapporteur's Commentary to the Declaration of July 2011.

Since the publication of the Commentary in 2011, the right of all persons to unhindered access to and communication with international bodies has been affirmed and its content has been further elaborated on, including in Human Rights Council resolution A/HRC/RES/22/6 on the *Protection of human rights defenders*, as well as in resolutions 24/L.24 on *Civil society space: creating and maintaining, in law and in practice, a safe and enabling environment* and

⁸ Report of the Special Rapporteur on the Situation of Human Rights Defenders on Human Rights Defenders (14 August 2008) UN Doc Annex para 7.

⁹ Report of the Special Rapporteur on the Situation of Human Rights Defenders on Human Rights Defenders (1 October 2004) UN Doc [A/59/401](#), para 33.

¹⁰ Report of the Special Rapporteur on the Situation of Human Rights Defenders on Human Rights Defenders (14 August 2008) UN Doc [A/63/288](#) Annex para 7.

¹¹ Report of the Secretary-General on Cooperation with the United Nations, its Representatives and Mechanisms in the Field (7 May 2010) UN Doc [A/HRC/14/19](#), para 55 (emphasis added).

¹² See for example Cass R. Sunstein, 'On the Expressive Function of Law', 144 *U. Pa. L. Rev.* 2021, 2024-2025 (1996) and Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford, Oxford University Press, 2008) 32.

¹³ Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties*, (Oxford: Oxford University Press, 2008) 32. Wibren Van Der Burg, 'The Expressive and Communicative Functions of Law, Especially with Regard to Moral Issues', *Law and Philosophy*: 20 (2001).

24/L.17 on *Cooperation with the United Nations, its mechanisms and representatives in the field of human rights*. These resolutions affirm and elaborate that:

- The international bodies that human rights defenders have a right to access include regional human rights mechanisms (see A/HRC/RES/22/6, OP 13);
- The scope of the institutions covered include ‘international institutions’ (A/HRC/RES/22/6, OP14a);
- The scope of protection covers not only to ‘those who cooperate, have cooperated or seek to cooperate’ but also to their ‘family members and associates’ (A/HRC/RES/22/6, OP14a); and
- The obligation includes avoiding legislation that has the effect of undermining the right to unhindered access (A/HRC/RES/22/6, OP14c).

In addition to refraining from reprisals and intimidation and ensuring that domestic laws and policies are in place to guarantee unhindered access to international bodies, Member States of the UN also have a further role to play in ensuring a safe and enabling environment is fostered at the international level.

3. PARTICULAR ENABLING ENVIRONMENT NEEDS OF WOMEN HUMAN RIGHTS DEFENDERS AND THOSE WORKING ON ISSUES OF SEXUAL ORIENTATION AND GENDER IDENTITY

The environment in which women human rights defenders carry out their work cannot be separated from the context in which they claim their rights¹⁴. The Women Human Rights Defenders International Coalition defines ‘context’ as ‘the dominating discourses and ideologies that can both serve to justify or reinforce discriminatory social, legal, economic, political and customary structures, practices and restrictions’¹⁵. Patriarchy and heteronormativity pervade most contexts. Patriarchal attitudes and behaviours are expressed in, and perpetuated by legal, political and administrative structures. The resulting structural inequalities and discrimination perpetuate gender subordination, adversely affecting women’s ability to claim rights and to defend them. Such discrimination constitutes a violation against women, and facilitates further violations against them, including in their work to defend human rights.

Patriarchal behaviours and attitudes inform culture, tradition and religious beliefs, in some cases leading to violations against women defenders who are perceived to be challenging the roles ascribed to them. That is to say, women defenders are frequently attacked because of their gender. Patriarchal attitudes and the privileging of heterosexuality in societies is also at the root of the attacks against women defenders when they work to advance sexual and reproductive rights and rights associated with sexuality and gender. This includes all those working to advance rights related to sexual orientation and gender identity and expression. Women defenders can face powerful social and religious agendas which do not ascribe to the universality of human rights.

Therefore, creating an enabling environment for women human rights defenders requires States to challenge the ideologies that in many societies construct a subordinate role for

¹⁴ Women human rights defenders are women that engage in the defence of all human rights, and all people who engage in the defence of the rights of women and rights related to gender and sexuality.

¹⁵ Women Human Rights Defenders International Coalition, *Global Report on the Situation of Women Human Rights Defenders*, 2011, Chapter 1, pg 1.

women and privilege heterosexuality. Modifying patterns of conduct that result in gender inequalities¹⁶ is a fundamental piece of States' overall responsibilities to eliminate discriminatory structures and practices.

More specifically, these ideologies often inform the attitude of the very State officials who are responsible for promoting and protecting individuals' right to defend rights, to the detriment of women defenders.¹⁷

Specific contexts can adversely affect the environment for human rights defender to carry out their work freely.¹⁸ In countries where homosexuality is criminalised, and/or the criminalisation of 'homosexual propaganda' is being advocated, the environment for lesbian, gay, bisexual transgender and intersex human rights defenders and those who defend the rights of LGBTI people is particularly difficult. International law prohibits discrimination on the grounds of sexual orientation and gender identity. Creating and sustaining an enabling environment for all human rights defenders involves the elimination of discrimination, which must include eliminating all discrimination on the grounds of sexual orientation and gender identity.

Enabling the work of women human rights defenders includes both eliminating the causes of systemic violence and discrimination including on the basis of gender, and ensuring all human rights defenders can freely exercise their rights in line with the UN Declaration on Human Rights Defenders. Creating an enabling environment for women human rights defenders requires State action to ensure women have equal rights as men to claim their rights, including the right to defend human rights. It requires States meet their obligations to work in common cause with human rights defenders in eliminating all forms of discrimination and violence.

4. POLITICAL SUPPORT AND PUBLIC EDUCATION REGARDING THE WORK OF HUMAN RIGHTS DEFENDERS

Political support

A corollary to State obligations to respect, protect and fulfil all human rights, is their responsibility to publicly acknowledge the vital role of human rights defenders in working to promoting and protecting all human rights.

As discussed above, high-level political recognition of, and support for, the valuable work of all human rights defenders is an important aspect of ensuring a safe and enabling environment for that work.

Such support should include both positive statements about the legitimate and necessary contribution of human rights defenders to democratic processes, development, accountability, the maintenance of peace, security, and the rule of law. Creating and

¹⁶ CEDAW, Article 5.

¹⁷ For one example, see Report of the UN Special Rapporteur for Human Rights Defenders (20 December 2010) UN Doc A/HRC/16/44, para 96.

¹⁸ For more on other contexts where the harmful effects of patriarchy on the work of women defenders is evident (eg contexts where fundamentalist actors are active; and contexts of militarisation and conflict) see: *Global Report on the situation of Women Human Rights Defenders* (op. cit).

sustaining an enabling environment for defenders also requires that State officials express unequivocal denunciation of any attacks, harassment, intimidation or reprisals against human rights defenders, and ensure due process in regard to alleged violations.

Public education

As recognised in Article 13 of the International Covenant on Economic, Social and Cultural Rights, States should recognise the right of all persons to education, including human rights education. In this regard, human rights educational programmes should include modules which draw from the UN Declaration of Human Rights Defenders and affirm the role played by human rights defenders in social development.

Enabling human rights defenders work involves educating and informing the population about – and regularly and publicly asserting – the universality of human rights, and the rights and responsibilities of all individuals to promote and protect human rights.

5. THE ROLE OF NON-STATE ACTORS, PARTICULARLY CORPORATIONS

The Human Rights Council's Working Group on business and human rights has highlighted the need for global action to prevent and redress attacks on human rights defenders who work on issues of corporate accountability. The harassment of human rights defenders working on issues of corporate accountability is expressly prohibited by the UN's Guiding Principles on Business and Human Rights, which provide that States and corporations must not obstruct or impair the legitimate and peaceful activities of human rights defenders.

While we welcome the Working Group's recognition of the important and legitimate role of civil society organisations, trade unions, and human rights defenders in raising awareness of the human rights impacts and risks of business enterprises and activities, the Special Rapporteur's report on a safe and enabling environment is a key opportunity to build on this from the perspective of the human rights defenders mandate.

In keeping with Articles 2 and 12 of the Declaration, the Guiding Principles on Business and Human Rights (the Guiding Principles) should be interpreted by States to require the enactment and enforcement of legislation and policy to protect civil society organisations and human rights defenders from harassment, persecution and reprisals linked to their corporate accountability work. This includes both the home states of corporations and the states in which they operate.

With regard to business actors themselves, the obligations in the Declaration require that the Guiding Principles be interpreted in such a way as to ensure that corporations do not restrict, impair or otherwise interfere with the legitimate work of human rights defenders, including the rights to freedom of expression, association and assembly. Corporations should also consult with human rights defenders about the human rights risks and impacts of their work.

For victims and their families, Article 9 of the Declaration stipulates that everyone has the right to benefit from an effective remedy. This includes ensuring full and proper investigation and accountability in relation to the harassment and intimidation of human rights defenders and others who sound the alarm about corporate human rights abuses.

6. THE ROLE OF THE UN

While the obligation to recognise and protect the right of unhindered access to international bodies is primarily an obligation of States, international bodies themselves, including the UN, also have a role to play in this regard.

Until very recently, the UN human rights system was attempting to address this issue through a set of ad hoc measures,¹⁹ in the absence of a comprehensive response. However, the obligation of the UN itself in ensuring unhindered access to its mechanisms was further affirmed in a ground-breaking development in September 2013 when the Human Rights Council adopted a resolution requesting the designation of a 'United Nations-wide senior focal point' to support and promote 'cooperation with the United Nations in the field of human rights, including cooperation with civil society.' The creation of such a focal point is the crystallisation of more than 20 years of efforts, initially within the Commission on Human Rights and subsequently within the Human Rights Council, to effectively guarantee the right to access international bodies, and confirms the protection of this right by both States and international bodies themselves as a crucial component of a safe and enabling environment.

What can States and other actors do to ensure these elements are in place, thereby facilitating an enabling environment for defenders?

Based on the elements of a safe and enabling environment outlined under question one, ISHR submits that the Special Rapporteur's report should include the following recommendations directed at different actors:

1. STATES SHOULD:

- Enact 'enabling legislation' which specifically guarantees the rights and obligations contained in the Declaration, contributes to an enabling environment by enhancing the implementation of those rights and obligations and accountability for their violation, and contributes to defenders' protection by providing a strong legal basis for their activities.
- Specifically guarantee the right to unhindered access to and communication with national, international, and regional bodies in their national legislation.
- Refrain from misusing national legislation or international procedures, such as the Committee on non-governmental organisations (NGOs) of ECOSOC, to undermine the right to unhindered access to and communication with national, international and regional bodies.
- Take all appropriate measures to prevent the occurrence of intimidation or reprisals, including, where necessary, by adopting and implementing specific legislation and policies and by issuing appropriate guidance to national authorities in order to effectively protect those who seek to cooperate, cooperate or have cooperated with the United Nations, its representatives and mechanisms in the field of human rights from any act of intimidation or reprisal.

¹⁹ Further details are available in; Sinclair, M (2013). *Ending Reprisals: The role of national laws and policies in protecting those who cooperate with the United Nations*, International Service for Human Rights, http://www.ishr.ch/sites/default/files/article/files/ishr_reprisals_report-09_13_updated.pdf

- Ensure that everyone whose rights are violated benefits from an effective remedy. This includes ensuring full and proper investigation and accountability in relation to intimidation and reprisals against human rights defenders.
- Publicly acknowledge the legitimate and vital role played by all human rights defenders working on the full spectrum of human rights, and publicly condemn instances of attack or intimidation against them.
- Ensure that relevant education programmes include modules covering the vital contribution of human rights defenders and the importance of the promotion of their work.

On women human rights defenders

To eliminate gender discrimination which impedes women's participation in the public and political sphere, and to claim their rights on an equal footing as men, States should:

- Implement CEDAW, with particular attention to Articles 2, 3, 5, 7.
- Strengthen and implement legal and policy measures promoting gender equality, empowering women and promoting their authority;
- Promote the equal participation, full involvement and leadership of women in society, ensuring they are active participants in decision making processes; and
- Integrate a gender perspective in their efforts to create a safe and enabling environment.

To ensure an enabling environment for all human rights defenders, working on the full spectrum of human rights, State should:

- Repeal laws used to criminalise individuals on grounds of homosexuality for engaging in consensual same sex sexual conduct,²⁰ and repeal laws or reject draft laws that criminalise 'homosexual propaganda'.²¹
- Ensure that individuals can exercise their rights to freedom of expression, association and peaceful assembly in safety without discrimination on grounds of sexual orientation and gender identity.²²

On human rights defenders working on issues of corporate accountability

In relation to human rights defenders working on corporate accountability, States should:

- Enact and enforce laws and policies to protect human rights defenders from harassment, persecution and reprisals linked to their corporate accountability work. This includes both the home states of corporations and the states in which they operate.

2. CORPORATIONS SHOULD:

- Meaningfully consult human rights defenders when conducting human rights risk and impact assessments of their operations.

²⁰ Report of the United Nations High Commissioner for Human Rights, UN Doc A/HRC/19/41, 84 (d).

²¹ Special Procedures' Joint Statement (1 February 2013) :

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12964&LangID=E>.

²² Report of the United Nations High Commissioner for Human Rights, UN Doc A/HRC/19/41, 84 (f).

- Respect the rights of human rights defenders, including those who promote corporate accountability, in all steps of the supply chain.
- Refrain from harassing, intimidating, and attacking human rights defenders working on issues of corporate accountability, or otherwise obstructing or impairing their legitimate and peaceful activities.

3. THE UNITED NATIONS SHOULD:

- Swiftly operationalise the universal condemnation of intimidation or reprisals against those who cooperate, seek to cooperate or have cooperated with its mechanisms and representatives by appointing a focal point at an appropriately high level within the UN structures.
- Mainstream the protection of human rights defenders in the work of all of its mechanisms, representatives and agencies.
- Gather and disseminate best practices on the creation of a safe and enabling environment for human rights defenders at the national level.
- Take steps, including through the newly created high-level focal point, to foster a safe and enabling environment for human rights defenders at the international level.
- Provide guidelines and/or training to UN staff interacting with human rights defenders on ensuring their protection and minimising the risk of reprisals and intimidation.

4. THE HUMAN RIGHTS COUNCIL SHOULD

Support the development of a model national law on human rights defenders to provide guidance and assistance to States in the domestic implementation of their obligations under the Declaration on Human Rights Defenders, including protections against reprisals or intimidation at the national level.

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