

**LAW AND THE PROTECTION OF HUMAN RIGHTS DEFENDERS: AN ANALYSIS OF THE INTERNATIONAL, INTER-AMERICAN, AND BRAZILIAN LEGAL FRAMEWORKS FOR THE PROTECTION OF HUMAN RIGHTS DEFENDERS<sup>1</sup>**

*DIREITO E A PROTEÇÃO DE DEFENSORES (AS) DE DIREITOS HUMANOS: UMA ANÁLISE DOS MARCOS LEGAIS INTERNACIONAL, INTERAMERICANO E BRASILEIRO PARA A PROTEÇÃO DE DEFENSORES (AS) DE DIREITOS HUMANOS*

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**ABSTRACT**

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Human rights defenders play a crucial role in strengthening democracy and bringing about human rights change. As they challenge dominant groups that control the economic and political powers, human rights defenders are frequently victims of state and non-state violence and, consequently, they are in constant need of effective protection. However, what do international, regional and Brazilian law say about the protection of human rights defenders? To whom belongs the obligation to protect human rights defenders exactly? While considering the interplay of international law, politics and national law in the protection of human rights defenders who are fighting for democracy, human rights and social justice locally, regionally and globally, this paper conducts an analysis of the legal frameworks for the protection of human rights defenders at the level of United Nations (UN) and Organisation of American State (OEA) human rights systems as well as Brazilian jurisdiction. It does so in order to argue that the Brazilian State has an obligation to protect human rights defenders and must adopt robust means of doing this, embracing their work as opportunity rather than a threat in building up a democratic society, as well as that there is a series of rights that are crucial for human rights defenders to be able to conduct their activities. The final section presents a brief conclusion in which this paper's discussions are recapitulated.

**KEYWORDS:** Human rights defenders. International human rights law. Brazilian law.

**RESUMO**

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Defensores (as) dos direitos humanos desempenham um papel crucial no reforço da democracia e promoção dos direitos humanos. Como eles desafiam grupos dominantes que controlam os poderes econômicos e políticos, defensores dos direitos humanos são

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frequentemente vítimas de violência estatal e não-estatal e, conseqüentemente, eles estão em constante necessidade de uma proteção eficaz. No entanto, o que o direito internacional, regional e brasileiro diz sobre a proteção de defensores (as) dos direitos humanos? A quem pertence a obrigação de proteger defensores (as) dos direitos humanos exatamente? Ao considerar a interação do direito internacional, da política e da legislação nacionais na proteção de defensores (as) dos direitos humanos que estão lutando pela democracia, direitos humanos e justiça social a nível local, regional e global, este trabalho realiza uma análise dos marcos legais para a proteção dos defensores dos direitos humanos no âmbito dos sistemas de direitos humanos da Organização das Nações Unidas (ONU) e Organização dos Estados Americanos (OEA), bem como jurisdição brasileira. Fáz-lo, a fim de argumentar que o Estado brasileiro tem a obrigação de proteger defensores (as) dos direitos humanos e deve adotar meios robustos de fazer isso, abraçando o seu trabalho como uma oportunidade e não uma ameaça na construção de uma sociedade democrática, bem como pela existência de uma série de direitos que são cruciais para defensores (as) dos direitos humanos serem capazes de conduzir suas atividades. A seção final apresenta uma breve conclusão na qual as discussões deste artigo são recapituladas.

**PALAVRAS-CHAVE:** Defensores de direitos humanos; Direitos humanos internacionais; Direito brasileiro.

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### INTRODUCTION

Human rights defenders (activists, militants, groups, human rights NGOs) are indispensable for the strengthening of democratic institutions and the organisation and carrying out of social struggles for human rights. As they challenge the *establishment* or *status quo*, human rights defenders are more often than otherwise victims of state and non-state violence perpetrated by powerful groups that usually control the economic and political powers. Hence, human rights defenders are constantly at risk, under threat and vulnerable as a result of their activities for democracy, human rights and social justice. There is no doubt, therefore, that human rights defenders need effective protection. However, *to whom belongs the legal obligation to protect human rights defenders? Who must protect human rights defenders according to law?* To answer such questions, I conduct an analysis of the international, regional, and Brazilian legal frameworks for the protection of human rights defenders. In the second section I shed light on the protection of human rights defenders under international human rights law. Further, in the third section, I examine the protection of human rights defenders under inter-American human rights law. Then, in the fourth section, I approach Brazil's current legal system in view of the country's re-democratization, and investigate the protection of human rights defenders under Brazilian constitutional and infra-

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constitutional law. Finally, in the fifth section, I present a brief conclusion in which I summarise the discussions conducted in this paper.

## 1. INTERNATIONAL HUMAN RIGHTS LAW APPLIED TO THE PROTECTION OF HUMAN RIGHTS DEFENDERS

This section analyses the protection of human rights defenders under international human rights law. It argues for the existence of a series of rights that are crucial for human rights defenders to be able to conduct their works for democracy, human rights and social justice. In international human rights law these rights are *the right to be protected, the right to freedom of assembly, the right to freedom of association, the right to access and communicate with international bodies, the right to freedom of movement, the right to freedom of opinion and expression, the right to protest, the right to develop and discuss new human rights ideas, the right to an effective remedy, and the right to access funding.*<sup>2</sup>

### 1.1 The right to be protected

It refers to the State's duty to protect the rights of human rights defenders. It derives from State's primary responsibility and duty to protect all human rights,<sup>3</sup> as regulated by the following international human rights instruments:

- Article 2 of the Universal Declaration of Human Right (UDHR)
- Articles 2, 9 and 12 of the UN Declaration on Human Rights Defenders
- Article 2 of the International Covenant on Civil and Political Rights (ICCPR)
- Article 3 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

The State's duty to protect the rights of human rights defenders implies their protection must be against violence from either state or non-state actors at all times.<sup>4</sup> In this regard, the right to be protected entails the *State's obligation to protect*, which involves negative and positive duties. In fact, States must not only refrain from violating human rights,<sup>5</sup> but also act

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<sup>2</sup> I adopted the same analytical approach as in *Commentary to the Declaration on the Rights and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms* (OHCHR, July 2011).

<sup>3</sup> UN A/65/223.

<sup>4</sup> *ibid*, para. 30-31.

<sup>5</sup> ICCPR General Comment No. 31: The Nature of the General Legal Obligation imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add. 13, 26 May 2006, para. 6.

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with due diligence to prevent violations of the rights of human rights defenders under their jurisdiction. They can do the latter usually by ‘taking legal, judicial, administrative and all other measures to ensure the full enjoyment by defenders of their rights; investigating alleged violations; prosecuting alleged perpetrators; and providing defenders with remedies and reparation’.<sup>6</sup> It also entails the *State’s responsibility for the acts of non-state actors*, that is, as the obligation to protect involves protecting human rights defenders against violence from non-State actors, the failure to do so might give rise to State responsibility.<sup>7</sup> By the same token, it follows that the *responsibility of non-state actors* refers to the fact all non-state actors should refrain from applying any kind of violence against human rights defenders. Although the State bears primary responsibility for protecting human rights defenders, articles 10, 11, 12.3 and 19 of the UN Declaration on Human Rights Defenders address everyone, including non-State actors.<sup>8</sup> This also means that non-state actors should not only promote the 1998 UN Declaration on Human Rights Defenders, but also protect the rights and work of human rights defenders.<sup>9</sup> This applies to private national or transnational corporations (business enterprises),<sup>10</sup> for they also have a responsibility to respect the rights of human rights defenders.<sup>11</sup> In other words, the Brazilian State and transnational and domestic businesses have a responsibility to protect human rights defenders and should adopt robust means of doing this, embracing the work of the human rights defenders as opportunity rather than a threat in building up a constitutional democratic society.

It is important to consider that States should *harmonize their domestic legal frameworks with the 1998 UN Declaration on Human Rights Defenders*.<sup>12</sup> This could ‘enhance the protection of human rights defenders and ensure that the rights and freedoms referred to in the [UN] Declaration [on Human Rights Defenders] are guaranteed’<sup>13</sup>. This could also involve

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<sup>6</sup> UN A/65/223, para. 34-35.

<sup>7</sup> *ibid*, para. 29, 41-42.

<sup>8</sup> A/HRC/13/22, para. 44. See also A/65/223, para. 2.

<sup>9</sup> *ibid* (n 6), para. 22.

<sup>10</sup> A/HRC/14/27, paras. 54-78. See also UN Human Rights Council Resolution 8/7.

<sup>11</sup> *ibid* (n 6), para. 23. See the report of the Special Representative on the issue of human rights and transnational corporations and other business enterprises, Mr. John Ruggie, A/HRC/8/5. The UN Human Rights Council endorsed a policy framework for business and human rights as elaborated in the report (A/HRC/8/5). The policy framework rests on the three principles of “protect, respect and remedy”. For more details see Mr. John Ruggie’s “Guiding Principles on Business and Human Rights”, available at OHCHR <[http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf)> accessed 9 January 2016.

<sup>12</sup> A/HRC/13/22, paras. 63-64.

<sup>13</sup> *ibid* (n 2), 12.

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States implementing *protection measures and programmes*,<sup>14</sup> as in Brazil's case, which has created the *Brazilian Programme for the Protection of Human Rights Defenders*.

Another point is that *the obligation to protect in States with a federal structure*, as in Brazil's case, implies that 'federal authorities retain the primary responsibility to protect human rights defenders and guarantee that their rights are protected'<sup>15</sup>. To define the primary responsibility is important because 'impunity continues to prevail and no specific compensation mechanisms for human rights violations committed against human rights defenders have been created'<sup>16</sup>. Thus, it is important States address the *issue of impunity* in order to ensure human rights defenders can continue doing their work in a safe environment.<sup>17</sup>

### 1.2 The right to freedom of assembly

It refers to the legitimacy of anyone and particularly human rights defenders to participate in any kind of peaceful activities to protest against human rights violations locally, regionally and globally.<sup>18</sup> The following international human rights instruments regulate it:

- Article 20(1) of the Universal Declaration of Human Right (UDHR)
- Articles 5 and 12 of the UN Declaration on Human Rights Defenders
- Article 21 of the International Covenant on Civil and Political Rights (ICCPR)
- Article 5 (d) (ix) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)
- Article 15 of the Convention on the Right of the Child (CRC)

The right to freedom of assembly is essential for human rights defenders and their work on the promotion and protection of human rights.<sup>19</sup> Without fully exercising this right, 'human rights defenders will be restricted in their ability to fulfil their fundamental role of protecting and promoting human rights'<sup>20</sup>. In spite of this, there have been restrictions to the right of assembly on the pretext of the need to maintain public order and under the auspices of counter-terrorism legislation, arguments and mechanisms.<sup>21</sup> In any case, it should be noted that any restrictions to the right to freedom of peaceful assembly must be in compliance with

<sup>14</sup> A/HRC/13/22, paras. 77-83; A/HRC/13/22/Add.3, para. 111-113; A/HRC/16/44, para. 90-96; E/CN.4/2006/95, para. 45-56.

<sup>15</sup> *ibid* (n 2), 14.

<sup>16</sup> A/HRC/13/22, para. 112; *ibid* (n 2), 14.

<sup>17</sup> See article 12 of UN Declaration on Human Rights Defenders.

<sup>18</sup> A/61/312, para. 76; A/58/380, para. 24.

<sup>19</sup> A/61/312, introduction and para. 76.

<sup>20</sup> *ibid* (n 2), 25.

<sup>21</sup> For more details see A/58/380, para. 25; A/61/312, para. 29-69.

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international (human rights) and domestic law to be permissible. According to article 21 of ICCPR this could be permitted on the grounds of ‘national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others’<sup>22, 23</sup>.

### 1.3 The right to freedom of association

It refers to the legitimacy of anyone and particularly human rights defenders to voluntarily ‘form, join and participate in non-governmental organizations, associations or groups’<sup>24</sup> in their activities for promoting and protecting human rights locally, regionally and globally.<sup>25</sup> The following international human rights instruments regulate this right:

- Article 20 of the Universal Declaration of Human Right (UDHR)
- Articles 5 of the UN Declaration on Human Rights Defenders
- Article 22 of the International Covenant on Civil and Political Rights (ICCPR)
- Article 8 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)
- Article 7 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)
- Article 2 of the Convention n.º 87 on the Freedom of Association and Protection of the Right to Organize of the International Labour Organization, 1948 (Co87)

Freedom of association engages an overlapping between civil and political rights.<sup>26</sup> As the former, it provides protection for human rights defenders when State and non-State actors arbitrarily interfere in their association with others to promote and protect human rights.<sup>27</sup> As the latter, it is essential for democracy once political struggles (disputes) usually occur in association with others (collectively).<sup>28</sup> In other words, ‘the protection of the right to freedom of association is fundamental to any democratic society, as there is a direct relationship between democracy, pluralism and the freedom of association’<sup>29, 30</sup>. In addition, it involves negative and positive obligations for the State, ‘including the obligation to prevent violations

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<sup>22</sup> *ibid* (n 2), 32.

<sup>23</sup> A/61/312, para. 56.

<sup>24</sup> Article 5(b) of the UN Declaration on Human Rights Defenders.

<sup>25</sup> Article 1 of the UN Declaration on Human Rights Defenders; A/59/401, para. 46; A/64/226, para. 7.

<sup>26</sup> Manfred Nowak, *UN Covenant on Civil and Political Rights, CCPR Commentary* (N.P. Engel, 2005), page 496. See also *ibid* (n 2).

<sup>27</sup> A/64/226.

<sup>28</sup> *ibid*.

<sup>29</sup> *ibid* (n 2), 35.

<sup>30</sup> *ibid* (n 27).

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of the right to freedom of association, to protect those exercising this right and to investigate violations thereof<sup>31</sup>.<sup>32</sup> In spite of this, the right to freedom of association has faced restrictions, particularly in regard to the registration, funding, management and functioning of human rights NGOs.<sup>33</sup>

Any restrictions to the right to freedom of voluntary association must be in compliance with international (human rights) and domestic law to be permissible. According to article 22, paragraph 2 of ICCPR this could be permitted only under the following conditions: ‘(a) it must be provided by law; (b) it may only be imposed for one of the purposes set out in paragraph 2; and (c) it must be necessary in a democratic society for achieving one of these purposes’<sup>34</sup>. This could be imposed to justify the pursuance of ‘legitimate aims’ such as ‘national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others’<sup>35</sup>.<sup>36</sup>

### **1.4 The right to access and communicate with international bodies**

It refers to the possibility of anyone and particularly human rights defenders, individually or in association with others, ‘to communicate with non-governmental or intergovernmental organizations’<sup>37</sup> and to have ‘unhindered access to and communication with international bodies with general or special competence to receive and consider communications on matters of human rights and fundamental freedoms’<sup>38</sup> in their activities for promoting and protecting human rights locally, regionally and globally.<sup>39</sup> The following international human rights norms regulate it:

- Article 11 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (OP-CEDAW)
- Articles 5(c) and 9(4) of the UN Declaration on Human Rights Defenders (DHRD)
- Article 15 of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OP-CAT)

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<sup>31</sup> *ibid* (n 2), 37.

<sup>32</sup> *ibid* (n 27), para. 43.

<sup>33</sup> For more details see E/CN.4/2006/95, para. 51.

<sup>34</sup> *ibid* (n 2), 43.

<sup>35</sup> *ibid* (n 2), 43-44.

<sup>36</sup> *ibid* (n 27), para. 30.

<sup>37</sup> Article 5(c) of the UN Declaration on Human Rights Defenders.

<sup>38</sup> Article 9(4) of the UN Declaration on Human Rights Defenders.

<sup>39</sup> Article 1 of the UN Declaration on Human Rights Defenders; A/59/401, para. 46; *ibid* (n 27), para. 7.

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- Article 13 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR)

The right to access and communicate with international bodies is essential for human rights defenders to conduct their work by ‘alerting the international community of human rights problems, and bringing key cases to the attention of regional and international human rights bodies and mechanisms’<sup>40</sup>.<sup>41</sup> In this sense, human rights defenders compose a kind of early warning system in every country.<sup>42</sup> This makes them important for the UN human rights system, once ‘it is often upon the basis of information gathered by defenders that the Human Rights Council is able to determine the need to actually establish a special rapporteur mandate’<sup>43</sup>.<sup>44</sup> Perhaps due to this, the right to access and communicate with international bodies has faced restrictions as, for instance, when it comes to human rights defenders having their freedom of movement and their right to access information violated either by State or non-State actors.<sup>45</sup> As it might be inferred, the right to access and communicate with international bodies is also protected under the freedom of movement as well as the freedom of expression,<sup>46</sup> both of which are commented below.

### 1.5 The right to freedom of movement

It refers to the possibility of anyone and particularly human rights defenders to freely move, individually or in association with others, within States in order to peacefully conduct their activities for the promotion and protection of human rights locally, regionally and globally.<sup>47</sup> The following international human rights instruments regulate this right:

- Article 13 of the Universal Declaration of Human Rights (UDHR)
- Articles 5(c) and 9(4) of the UN Declaration on Human Rights Defenders
- Article 12 of the International Covenant on Civil and Political Rights (ICCPR)

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<sup>40</sup> *ibid* (n 2), 43.

<sup>41</sup> A/60/339, para. 65.

<sup>42</sup> E/CN.4/2005/101, para. 131; A/60/339, paras. 8 and 9.

<sup>43</sup> *ibid* (n 2), 51.

<sup>44</sup> A/58/380, para. 60.

<sup>45</sup> E/CN.4/2005/101, para. 37 and 59; A/61/312, para. 60; and E/CN.4/2004/94, para. 32.

<sup>46</sup> Human Rights Committee, Concluding Observations on Uzbekistan, 26 April 2005, § 19, CCPR/CO/83/UZB; Human Rights Committee, Concluding Observations on Morocco, 1 December 2004, § 18, CCPR/CO/82/MAR; *The Right to Access International Bodies*, Human Rights Defenders Briefing Papers (International Service for Human Rights, 2009), available at ISHR <[www.ishr.ch](http://www.ishr.ch)> accessed 25 January 2016. See also OEA/Ser.L/V/II.124, Doc. 5, rev. 1, 7 March 2006, paras. 101-105.

<sup>47</sup> *ibid* (n 2). See also *Compilation of International and Regional Instruments for the Protection of Human Rights Defenders* (International Service for Human Rights, 2004), available at ISHR <[www.ishr.ch](http://www.ishr.ch)> accessed 25 January 2016.

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- Article 5(d)(i) of the Convention on the Elimination of All Forms of Racial Discrimination (ICERD)
- Article 26 of the Convention relating to the Status of Refugees

The right to freedom of movement is important for the work of human rights defenders. Without being able to freely move within States, they would be prevented from organizing and carrying out the fights for democracy, human rights and social justice.<sup>48</sup> By being able to freely and safely move within States and cooperate with the UN human rights system, human rights defenders might have a much stronger impact on protecting and promoting human rights locally, regionally and globally.<sup>49</sup> Consequently, States together with the UN human rights bodies should prevent any act of violence that could intimidate individuals or groups who move freely within States and seek to cooperate with international and regional human rights systems. In the event of any intimidation or reprisal against these individuals or groups (human rights defenders), States in cooperation with the UN should fully investigate and bring the perpetrators to justice.<sup>50</sup>

### **1.6 The right to freedom of opinion and expression**

It refers to the possibility of anyone and particularly human rights defenders, individually or in association with others, to hold opinions without interference, freely access information and impart any kind of information and ideas, while peacefully conducting their activities for the promotion and protection of human rights locally, regionally and globally.<sup>51</sup> The following international human rights instruments regulate this right:

- Article 19 of the Universal Declaration of Human Right (UDHR)
- Article 6 of the UN Declaration on Human Rights Defenders
- Article 19 of the International Covenant on Civil and Political Rights (ICCPR)
- Article 5(d)(viii) of the Convention on the Elimination of All Forms of Racial Discrimination (ICERD)
- Article 13 of the Convention on the Rights of the Child (CRC)

The right to freedom of opinion and expression possesses an individual as well as a collective element.<sup>52</sup> As the former, it demands no one (individual) be prevented from

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<sup>48</sup> A/RES/63/243; A/RES/64/138.

<sup>49</sup> A/HRC/RES/12/2; E/CN.4/RES/2005/9.

<sup>50</sup> A/HRC/14/19; A/HRC/10/36; A/HRC/RES/12/2.

<sup>51</sup> I/A Court H. R., *Ivcher Bronstein Case*. Judgement of February 6, 2001. Series C, N.º 74, para. 149; A/HRC/14/23, para. 24; A/58/380, para. 14. See also OEA... (n 46), para. 79; *ibid* (n 2), 58.

<sup>52</sup> *ibid* (n 2), 59.

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imparting his or her ideas and thoughts freely. As the latter, it implies everyone (collective) be given full access to information and the ideas and thoughts freely expressed by others.<sup>53</sup> Further, it involves negative and positive obligations for the State. These obligations are the abstinence from interfering with the enjoyment of the right; the protection of the right by preventing, punishing, investigating, and providing redress for harm caused by non-State actors; and the taking of positive measures for the realization of the right.<sup>54</sup>

Freedom of expression is essential for the work of human rights defenders. By exercising this right, human rights defenders impart their ideas and thoughts through their activities in the promotion and protection of human rights. Possibly because of this, this right has faced restrictions, particularly in regard to persecutions of defenders who criticize the government, the access to information, the misuse of the legal system to harass human rights defenders and hinder their work, among others.<sup>55</sup> In any case, it should be borne in mind that no restrictions can be permitted as to the first aspect of the right to the right to freedom of opinion and expression, that is, the right to hold opinions without interference.<sup>56</sup> As to the second and third aspects of that right, that is, the right to freely access information and the right to freely impart any kind of information, ideas and thoughts, Article 19, paragraph 3 of the ICCPR states that any restriction must be provided by international (human rights) and domestic law to be permissible.<sup>57</sup> Also, according to Article 19, paragraph 3 of ICCPR this could be permitted only under the following conditions: ‘(a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals’<sup>58</sup>. This could be imposed to justify the pursuance of legitimate interests of other persons or society as a whole.<sup>59</sup>

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<sup>53</sup> I/A Court H.R., Advisory Opinion OC-5/85, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism. November 13, 1985. Series A, N.º 5, para. 30; OEA... (n 46), para. 78. See also *ibid* (n 2), 59.

<sup>54</sup> A/HRC/14/23, para. 25, report 20 April 2010. See also *ibid* (n 2), 59.

<sup>55</sup> For more details see A/58/380; CCPR/C/CG/34 on article 19, para. 31; A/60/339, para. 52; E/CN.4/2004/94, para. 52; E/CN.4/2005/101, para. 29; A/63/288, para. 54; A/HRC/14/23, para. 84, report 20 April 2010; A/HRC/13/22, para. 33; A/HRC/7/14, para. 39; A/HRC/11/4, para. 9. See also OEA... (n 46), para. 81.

<sup>56</sup> General Comment nº 10: Freedom of expression (Art. 19) (Nineteenth session, 1983), Human Rights Committee, para. 1. See also *ibid* (n 2), 65.

<sup>57</sup> See *Principles Concerning Permissible Limitations or Restrictions to the Right to Freedom of Expression* by the Special Rapporteur on Freedom of Opinion, available at UN <[www.un.org](http://www.un.org)> accessed 25 January 2016; E/CN.4/1985/4, annex; General Comments adopted by the Human Rights Committee n.º 10 (article 19), n.º 11 (article 20), and n.º 27 (article 12); A/HRC/14/23, para. 78, 20 April 2010.

<sup>58</sup> General Comment nº 10: Freedom of expression (Art. 19) (Nineteenth session, 1983), Human Rights Committee, para. 4. See also *ibid* (n 2), 65.

<sup>59</sup> *ibid*.

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## 1.7 The right to protest

It demands the ‘recognition and protection of a set of rights that includes freedom of expression and opinion, freedom of association, freedom of peaceful assembly and trade union rights, including the right to strike’<sup>60</sup>, all of which essential for the work of human rights defenders in the promotion and protection of human rights.<sup>61</sup> This right is regulated by the following international human rights instruments:

- Article 8 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)
- Article 5(a) of the UN Declaration on Human Rights Defenders
- Article 11 of the Convention n.º 87 on the Freedom of Association and Protection of the Right to Organize of the International Labour Organization, 1948 (Co87)

The right to protest is essential for human rights defenders to monitor – exercise social control over – state practices. Historically, demonstrations and protests have been an effective way in which human rights defenders can exert pressure on governments and, thus, bring about human rights change. The right to protest entails positive and negative obligations on the part of States.<sup>62</sup> States should not only avoid interfering with peaceful protests, but also protect rights holders in the exercise of their right to protest. States should also ‘take deliberate, concrete and targeted steps to build, maintain and strengthen pluralism, tolerance and an open attitude to the expression of dissent in society’<sup>63</sup>. By exercising this right, human rights defenders express their ideas, thoughts and dissent, which helps to strengthen democracy and promote and protect human rights. Thus, this right has faced restrictions, particularly in regard to bans on demonstrations; unjustified restrictions on demonstrations; unnecessary requirements to obtain authorizations that affect the enjoyment of freedom of assembly; arrest of protestors amounting to arbitrary detention; among others.<sup>64</sup> While attempting to exercise the right to protest several human rights defenders have faced ‘harassment, intimidation, violence, arrest, detention, ill-treatment and, in some cases, defenders have been killed’<sup>65</sup>. This might have been happening due to ‘implementation gaps

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<sup>60</sup> *ibid* (n 2), 70.

<sup>61</sup> A/62/225, para. 12.

<sup>62</sup> A/62/225, summary and paras. 4, 33, 40, 46, 56, and 97.

<sup>63</sup> *ibid* (n 2), 70.

<sup>64</sup> A/62/225, para. 20. See also *ibid* (n 2), 73.

<sup>65</sup> *ibid* (n 2), 74. See also A/HRC/16/44/Add.1; A/HRC/13/22/Add.1; A/HRC/10/12/Add.1; A/HRC/7/28/Add.1.

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related to legal frameworks not complying with international obligations, restrictions to the right to strike and bans or limitations of the right to strike for civil servants<sup>66</sup>.

### **1.8 The right to develop and discuss new human rights ideas**

It refers to the possibility of anyone and particularly human rights defenders, individually or in association with others, to take part in the current human rights developments. In this regard, it is ‘an important provision to guarantee the on-going development of human rights and to protect those defenders that advocate new visions and ideas of human rights’<sup>67</sup>. This right is regulated by Article 7 of the UN Declaration on Human rights Defenders and it might be seen also ‘as an elaboration of the right to freedom of opinion and expression, the right to freedom of assembly and the right to freedom of association which are protected under the [UN] Declaration [on Human Rights Defenders]’<sup>68</sup> and other international and regional human rights instruments. Restrictions to this right usually occur in relation to women human rights defenders and activists working on LGBTI rights.<sup>69</sup>

### **1.9 The right to an effective remedy**

It refers to the possibility of everyone and particularly human rights defenders to ‘benefit from an effective remedy and to be protected in the event of the violation of his/her human rights and fundamental freedoms’<sup>70, 71</sup>. It entails the State responsibility to provide effective remedy to human rights defenders who had their human rights and fundamental freedoms violated either by state or non-state actors.<sup>72</sup> States should investigate alleged violations; persecute perpetrators; provide redress and appropriate compensation (reparation) to victims; and enforce decisions or judgments.<sup>73</sup> The absence of effective remedy implies further violence against human rights defenders and more restrictions to their work in the

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<sup>66</sup> *ibid* (n 2), 73. See also A/62/225, para. 22.

<sup>67</sup> *ibid* (n 2), 84.

<sup>68</sup> *ibid* (n 2), 83.

<sup>69</sup> *ibid* (n 2), 85-86.

<sup>70</sup> *ibid* (n 2), 89.

<sup>71</sup> A/65/223, para. 44.

<sup>72</sup> *ibid*.

<sup>73</sup> *ibid* (n 2), 89.

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promotion and protection of human rights locally, regionally and globally.<sup>74</sup> The following international human rights instruments regulate this right:

- Article 8 of the Universal Declaration of Human Right (UDHR)
- Article 9 of the UN Declaration on Human Rights Defenders
- Article 2(3) and 9(5) of the International Covenant on Civil and Political Rights (ICCPR)
- Articles 13 and 14 of the Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT)
- Article 6 of the Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

Restrictions to the right to an effective remedy also mean that impunity prevails for those state and non-state actors violating the rights of human rights defenders.<sup>75</sup> The lack of response by state (executive, legislative and judiciary) authorities is a frequent challenge for human rights defenders worldwide.<sup>76</sup> The Executive commonly abstains from taking effective action to prevent or remedy violations of the rights of defenders.<sup>77</sup> The Judiciary usually fails to convict perpetrators in cases brought by human rights defenders.<sup>78</sup> The Legislative refrains from passing primary legislation to protect human rights defenders (as in Brazil's case) and remedy those defenders who have had their human rights and fundamental freedoms violated.<sup>79</sup> Consequently, it is clear that 'far from fulfilling their duty of protection, a number of States seem to criminalize the activities of defenders and tolerate, and in some cases legitimize the abuses perpetrated against them'<sup>80</sup>. The end of impunity is the key for guaranteeing security for human rights defenders and their work for the promotion and protection of human rights locally, regionally and globally.<sup>81</sup>

### **1.10 The right to access funding**

It refers to the possibility of anyone and particularly human rights defenders, individually or in association with others, to solicit, receive and utilize resources in the peaceful conduction of their activities for the promotion and protection of human rights

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<sup>74</sup> *ibid* (n 71).

<sup>75</sup> E/CN.4/2004/94, para. 71; A/65/223, para. 42-43; A/HRC/13/22/Add.3; E/CN.4/2006/95, para. 59.

<sup>76</sup> A/HRC/16/44. See also *ibid* (n 2), 92.

<sup>77</sup> E/CN.4/2004/94.

<sup>78</sup> E/CN.4/2004/94, para. 72.

<sup>79</sup> *ibid*.

<sup>80</sup> *ibid* (n 2), 92. See also E/CN.4/2004/94, para. 73.

<sup>81</sup> A/62/223, para. 42.

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locally, regionally and globally.<sup>82</sup> Besides being protected in international and regional human rights instruments under provisions that regulate the right to freedom of association,<sup>83</sup> the right to access funding is also regulated, as a separate right, by the following international human rights instruments:

- Article 6(f) of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief
- Article 3 and 13 of the UN Declaration on Human Rights Defenders

Restrictions to the right to access funding impact human rights defenders' right to freedom of association, for 'when individuals are free to exercise their right to associate, but are denied the resources to carry out activities and operate an organization, the right to freedom of association becomes void'<sup>84</sup>.<sup>85</sup> Thus, States should elaborate domestic legislation to regulate the right to access funding. This domestic legislation must be in compliance with international human rights law and, thus, guarantee human rights defenders, individually or in association with others (NGOs), the right to fully access either national or foreign funding for carrying out their work for the protection and promotion of human rights locally, regionally and globally.<sup>86</sup>

As clarified earlier, the aforementioned rights are crucial for human rights defenders to conduct their works for democracy, human rights and social justice. Therefore, it is paramount to emphasize that the aforesaid international human rights treaties can be applied to the protection of human rights defenders and their work. The activity one develops on the promotion and protection of human rights is what makes them human rights defenders. In order to develop such activities one must exercise the aforementioned rights. Once one finds himself or herself threatened or vulnerable as a consequence of the activities for the promotion and protection of human rights, then there is a legal ground to demand protection from the State, which has the obligation to protect all persons under its jurisdiction against state or non-state violence according the abovementioned human rights instruments. Although human rights defenders are usually included within the category of persons entitled to

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<sup>82</sup> *ibid* (n 51). See also *ibid* (n 2), 89; *The Right to Access Funding, Human Rights Defenders Briefing Papers* (International Service for Human Rights, 2009), available at ISHR <[www.ishr.ch](http://www.ishr.ch)> accessed 25 January 2016.

<sup>83</sup> A/64/226, para. 91.

<sup>84</sup> *ibid* (n 2), 95.

<sup>85</sup> A/59/401, paras. 75-77; E/CN.4/2006/95, para. 31; A/64/226, paras. 94-100.

<sup>86</sup> E/CN.4/2006/95, para. 30.

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exercise fundamental rights under state protection, their special situation<sup>87</sup> has called for the adoption of specific documents, designed for their protection, both at the UN and OAS human rights systems. At the global level the UN acknowledges the important work realized by persons, groups and institutions in the protection of human rights, including non-governmental organizations (NGOs). It was in accordance with this imperative, after about thirteen years of negotiations, that the UN General Assembly adopted the Resolution A/RES/53/144 of 9 December 1998 approving, therefore, the *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms* or simply *UN Declaration on Human Rights Defenders*.<sup>88</sup>

According to article 2 (1) of this Declaration ‘[e]ach State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms, *inter alia*, by adopting such steps as may be necessary to create all conditions necessary in the social, economic, political and other fields, as well as the legal guarantees required to ensure that all persons under its jurisdiction, individually and in association with others, are able to enjoy all those rights and freedoms in practice’<sup>89</sup>. Consequently, as stated in article 2 (2) of this Declaration, it is required that ‘[e]ach State shall adopt such legislative, administrative and other steps as may be necessary to ensure that the rights and freedoms referred to in the present Declaration are effectively guaranteed’<sup>90</sup>. These responsibilities and obligations apply to the Brazilian State, which has ratified the majority of international human rights instruments.

### **2. INTER-AMERICAN HUMAN RIGHTS LAW APPLIED TO THE PROTECTION OF HUMAN RIGHTS DEFENDERS**

This section assesses the protection of human rights defenders under inter-American human rights law. It also argues for the existence of a series of rights that are crucial for human rights defenders to be able to conduct their works for democracy, human rights and social justice. In inter-American human rights law these rights are *the right to be protected, the right to freedom of assembly, the right to freedom of association, the right to freedom of*

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<sup>87</sup> Due to their activities they are exposed to state and non-state actors’ violence.

<sup>88</sup> United Nations (UN) <<http://www.un.org/>> accessed 25 January 2016.

<sup>89</sup> A/RES/53/144.

<sup>90</sup> *ibid.*

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*movement, the right to freedom of opinion and expression, the right to protest, and the right to an effective remedy.*<sup>91</sup> A specific inter-American human rights instrument might not regulate some of the rights mentioned in the previous section. When this is the case, international human rights instruments can be effectively used to guarantee the protection of human rights defenders in the Americas. In general, the ideal is to work with both UN and OAS human rights systems in order to demand States to protect human rights defenders and their work for the promotion and protection of human rights. In any case, under inter-American human rights law:

- *The right to be protected* is regulated by Article 1 of the American Convention on Human Rights (ACHR);
- *The right to freedom of assembly* is regulated by Article 15 of the American Convention on Human Rights (ACHR);
- *The right to freedom of association* is regulated by Article 16 of the American Convention on Human Rights (ACHR);
- *The right to freedom of movement* is regulated by Article 22 of the American Convention on Human Rights (ACHR);
- *The right to freedom of opinion and expression* is regulated by Article 13 of the American Convention on Human Rights (ACHR);
- *The right to protest* is regulated by Article 27 of the Inter-American Charter of Social Guarantees of 1948 and Article 8(1)(b) of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988 (AP-ACHR-ESCR); and
- *The right to an effective remedy* is regulated by Article 25 of the American Convention on Human Rights (ACHR) and Article 4(g) of the Inter-American Convention on Violence against Women (Convention of “Belem do Para”).

There are not yet any specific inter-American human rights instruments to regulate *the right to access and communicate with international bodies; the right to develop and discuss new human rights ideas; and the right to access funding*. In these cases, human rights defenders might demand State protection on the grounds of related international human rights instruments. Here as well, it is vital to emphasize that the aforesaid inter-American human rights treaties can be applied to the protection of human rights defenders and their work. As explained earlier, the activity one develops on the promotion and protection of human rights is what makes them human rights defenders. In order to develop such activities one must exercise the aforementioned rights. Once one finds himself or herself threatened or vulnerable as a consequence of the activities for the promotion and protection of human rights, then there is a legal ground to demand protection from the State, which has the obligation to protect all

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<sup>91</sup> *ibid* (n 2).

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persons under its jurisdiction against state or non-state violence according to the abovementioned inter-American human rights instruments.

The Inter-American Human Rights System establishes these guarantees based on the *American Convention on Human Rights “Pact of San Jose, Costa Rica”*<sup>92</sup>, the *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights “Protocol of San Salvador”*<sup>93</sup> and other regional human rights instruments. Nonetheless, as explained earlier, although human rights defenders are entitled to enjoy fundamental rights under state protection, their special situation<sup>94</sup> has called for the adoption of specific documents designed for their protection. The crux of the dilemma is that there is no instrument produced by the *Organization of American States* (OAS) that specifically regulates the rights of human rights defenders. In any case, it is generally accepted, however, that the various dispositions present in OAS instruments for human rights protection are fully capable of guaranteeing the required legal conditions for human rights defenders<sup>95</sup> to demand State effective protection in order to safely continue their work for the protection and promotion of human rights in the Americas.<sup>96</sup>

Additionally, the Inter-American Court of Human Rights has ‘duly recognized the importance of the work done by human rights defenders and that the state has a duty to protect them’<sup>97</sup> in its rulings concerning the cases *Heliodoro Portugal versus Panama*<sup>98</sup> and *Myrna Mack Chang versus Guatemala*.<sup>99</sup> Additionally, there are several annual OAS General Assembly resolutions as, for example, AG/RES. 1671 (XXIX-O/99), of 7 June 1999, and AG/RES. 1818 (XXXI-O/01), of 5 June 2001, regulating, direct or indirectly, themes concerned with the protection of human rights defenders.<sup>100</sup> Therefore, despite the lack of an inter-American human rights instrument to specifically regulate the rights of human rights defenders, the existing regional human rights instruments and mechanisms can be effectively applied to protect human rights defenders in the Americas.

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<sup>92</sup> OAS <[www.oas.org](http://www.oas.org)> accessed 25 January 2016.

<sup>93</sup> *ibid.*

<sup>94</sup> *ibid.* (n 87).

<sup>95</sup> *ibid.* (n 92). See also *ibid.* (n 6).

<sup>96</sup> OEA... (n 46).

<sup>97</sup> Quintana and Fernández (2011: 6).

<sup>98</sup> IACHR <[http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_186\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_186_ing.pdf)> accessed 25 January 2016.

<sup>99</sup> IACHR <[http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_101\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_101_ing.pdf)> accessed 25 January 2016.

<sup>100</sup> *ibid.* (n 95).

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Those aforesaid inter-American human rights instruments can be applied to the Brazilian State, which has ratified the majority of regional human rights instruments.<sup>101</sup>

## 3. BRAZILIAN LAW APPLIED TO THE PROTECTION OF HUMAN RIGHTS DEFENDERS

This section briefly describes Brazil's current legal system in light of the country's re-democratization, and analyses the protection of human rights defenders under Brazilian constitutional and infra-constitutional law.

With Brazil's re-democratization came the 1988 Constitution. It represents the legal rupture with the authoritarian regime (1964-1985). As it could be expected, it was designed to protect primordially the human rights and fundamental freedoms of everyone under the Brazilian jurisdiction. In this sense, it is the core legal instrument for demanding the access and full enjoyment of fundamental human rights domestically. However, in reality, it is more than that. It is, in fact, a socio-political instrument with which human rights defenders can demand the protection and promotion of human rights in Brazil. This is so due to the fact civil society's claims for democracy, human rights and social justice are represented in the text of the 1988 Constitution. That is why it has been nicknamed the "Citizen Constitution".

Article 5, Paragraph 1, determines that the provisions referring to fundamental rights and guarantees have immediate application within the Brazilian legal system. This means human rights matters must have prevalence over any other matter in Brazilian constitutional law, which, consequently, impacts the making and further application of infra-constitutional legislation.<sup>102</sup> In Article 5, Paragraph 2, there is express reference to Brazil's human rights obligations derived from international treaties ratified by the country.<sup>103</sup> Article 5, Paragraph 3, even gives constitutional status to international human rights instruments, given they have been internalized through the same legislative procedure applicable to Constitutional Amendments.<sup>104</sup> This means Brazil must fulfil all human rights obligations derived from

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<sup>101</sup> OEA... (n 46).

<sup>102</sup> 'Article 5, Paragraph 1. The provisions that define the fundamentals rights and guarantees have immediate application.' Full text available at STF <<http://www.stf.jus.br/>> accessed 25 January 2016.

<sup>103</sup> 'Article 5, Paragraph 2. The rights and guarantees expressed in this Constitution do not exclude others deriving from the regime and from the principles adopted by it, or from the international treaties in which the Federative Republic of Brazil is a party.' Full text available at STF <<http://www.stf.jus.br/>> accessed 25 January 2016.

<sup>104</sup> 'Article 5, Paragraph 3. The international treaties and conventions on Human Rights which are approved, in each House of National Congress, in two rounds, by three fifths of votes of the respective members, will be

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international and inter-American human rights treaties it has ratified. In other words, Brazil must respect, protect and fulfil human rights, and also protect human rights defenders and their work in the promotion and protection of human rights locally, regionally and globally.

*Table 1* depicts this below.

<b>Table 1 – Brazil’s Legal Framework for the Protection of Human Rights and the Reception of International and Regional Human Rights Instruments by its Legal System (1945 to 2014).</b>				
UN Human Rights Instruments <sup>105</sup>		OAS Human Rights Instruments <sup>106</sup>		Brazilian Law <sup>107</sup>
Biding	Non-Binding	Biding	Non-Binding	
CPPCG (ratified in 1952). CERD (ratified in 1968). CEDAW (ratified in 1984). CAT (ratified in 1989). CRC (ratified in 1990). CCPR (acceded in 1992). CESC (acceded in 1992). CEDAW-OPT (ratified in 2002). CRC-OPT-AC (ratified in 2004). CRC-OPT-SC (ratified in 2004). CAT-OPT (ratified in 2007). CRPD (ratified in 2008). CRPD-OPT (ratified in 2008). CCPR-OPT1 (ratified in 2009). CCPR-OPT2 (ratified in 2009). CED (ratified in 2010).	Universal Declaration of Human Rights. UN Declaration on Human Rights Defenders (A/RES/53/144, March 8 <sup>th</sup> , 1999).	ICGCRW (ratified in 1952) ICGPRW (ratified in 1950). ICPPT (ratified in 1989). ACHR (acceded in 1992). ICPPEVAW (ratified in 1995). AP-ACHR-ESCR (acceded in 1996). OP-ACHR-ADP (ratified in 1996). IACFDP (ratified in 2013).	OAS Resolutions on Human Rights Defenders, such as: - AG/RES. 1671 (XXIX-O/99, June 7 <sup>th</sup> , 1999).	1988 Federal Constitution.  Infra-constitutional legislation.

The debate concerns, thus, the obligation of the Brazilian State to assure the necessary conditions in order for everyone under its jurisdiction to enjoy their fundamental human rights. According to the 1988 Constitution – and international and regional human rights instruments ratified by Brazil<sup>108</sup> –, the Brazilian State must guarantee not only the right to life itself, but also and above all, the right to a life with dignity.<sup>109</sup> The full realization of the right to a dignified life is forcefully related to the entire (formal and material) enjoyment of all fundamental human rights, as regulated by the 1988 Constitution. Moreover, the constitutional principles contained in the 1988 Constitution have been set to guarantee the full

equivalent to Constitutional Amendments.’ Full text available at STF <<http://www.stf.jus.br/>> accessed 9 January 2016.

<sup>105</sup> UN OHCHR <<http://www.ohchr.org/EN/countries/LACRegion/Pages/BRIndex.aspx>> accessed 9 January 2016.

<sup>106</sup> OAS <[http://www.oas.org/dil/treaties\\_signatories\\_ratifications\\_member\\_states\\_brazil.htm](http://www.oas.org/dil/treaties_signatories_ratifications_member_states_brazil.htm)> accessed 9 January 2016.

<sup>107</sup> STF <<http://www.stf.jus.br/>> accessed 25 January 2016.

<sup>108</sup> Ministério das Relações Exteriores <<http://www.itamaraty.gov.br/index.php?lang=pt-BR>> accessed 25 January 2016.

<sup>109</sup> Article 1, III, of 1988 Brazilian Constitution. See also Sarlet (2004).

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exercise of *citizenship*<sup>110</sup> and *human dignity*<sup>111</sup> by everyone under Brazilian jurisdiction indiscriminately.<sup>112</sup> In fact, the promotion of the collective well-being – irrespective of origin, race, ethnicity, gender, sexual orientation, and so on – is expressed within the constitutional text as a core objective of the Brazilian State.<sup>113</sup> As a result, it is crucial to comprehend that the 1988 Constitution expressly guarantees the inviolability of the right to a life with dignity.<sup>114</sup> This also means that the applicability and/or interpretation of any infra-constitutional legislation within Brazil’s jurisdiction must be in consonance with this imperative, on the grounds of assuring its constitutionality.

Particularly concerning rights that impact human rights defenders and their work, the 1988 Constitution guarantees – at least formally – not only the aforementioned *right to life with dignity*, but also *the right to personal integrity and freedom*;<sup>115</sup> *the right to organize peaceful meetings or gatherings*;<sup>116</sup> *the right to association*;<sup>117</sup> *the right to freedom of expression*;<sup>118</sup> *the right to access public information (habeas data)*;<sup>119</sup> *the right to privacy and to the protection of honour and dignity*;<sup>120</sup> *the right to a due process of law*;<sup>121</sup> *the right to access to justice and legal aid*;<sup>122</sup> and among other legal guarantees.<sup>123</sup> In summary, it can be

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<sup>110</sup> Article 1, II, of 1988 Brazilian Constitution. For a discussion on social movements and their claim for a *new citizenship* in Brazil see Gohn (2012 and 1997); Gonçalves (2006); Dagnino (2014, 2011, 2010, 2007 and 2000).

<sup>111</sup> *ibid* (n 109).

<sup>112</sup> ‘**Article 1.** The Federative Republic of Brazil, formed by the indissoluble union of the states and municipalities and of the Federal District, is a legal democratic state and is founded on: I - sovereignty; II - citizenship; III - the dignity of the human person; IV - the social values of labour and of the free enterprise; V - political pluralism. Sole paragraph - All power emanates from the people, who exercise it by means of elected representatives or directly, as provided by this Constitution’. Full text available at STF <<http://www.stf.jus.br/>> accessed 25 January 2016.

<sup>113</sup> ‘**Article 3.** The fundamental objectives of the Federative Republic of Brazil are: I - to build a free, just and solidary society; II - to guarantee national development; III - to eradicate poverty and substandard living conditions and to reduce social and regional inequalities; IV - to promote the well-being of all, without prejudice as to origin, race, sex, colour, age and any other forms of discrimination’. Full text available at STF <<http://www.stf.jus.br/>> accessed 25 January 2016.

<sup>114</sup> Particularly in the **Title II** (Fundamental Rights and Guarantees), **Chapter I** (Individual and Collective Rights and Duties), **Article 5, caput** (‘**Article 5.** All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property [...]’); and **Chapter II** (Social Rights), **Article 6, caput** (‘**Article 6.** Education, health, work, habitation, leisure, security, social security, protection of motherhood and childhood, and assistance to the destitute, are social rights, as set forth by this Constitution’) there is formal guarantee to the inviolability of the right to life. Full text available at STF <<http://www.stf.jus.br/>> accessed 25 January 2016.

<sup>115</sup> Article 5, *caput*, of the 1988 Constitution.

<sup>116</sup> Article 5, XVII, of the 1988 Constitution.

<sup>117</sup> Article 5, XVII, XVIII, XIX and XX, of the 1988 Constitution.

<sup>118</sup> Article 5, IV, VI and IX, of the 1988 Constitution.

<sup>119</sup> Article 5, XIV, XXXIII, LXXVII, and LXXVII, of the 1988 Constitution.

<sup>120</sup> Article 5, X, of the 1988 Constitution.

<sup>121</sup> Article 5, LIV, of the 1988 Constitution.

<sup>122</sup> Article 5, LXXIV, of the 1988 Constitution.

<sup>123</sup> Article 5, LV and LVI, of the 1988 Constitution.

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argued that the 1988 Constitution provides the formal guarantees for the full enjoyment of fundamental human rights by everyone and particularly human rights defenders under Brazil's jurisdiction.<sup>124</sup> The crux of the dilemma arises, however, from the fact that the 1988 Constitution provides such guarantees only formally. The gap between what the constitutional law expresses and its applicability in reality remains enormous. And this impacts not only human rights defenders' activities, but also human rights defenders themselves, who are victimized by both state and non-state violence in Brazil.<sup>125</sup>

Another serious issue refers to the lack of (infra-constitutional) primary legislation to regulate the protection of human rights defenders in Brazil. Although there is a "Brazilian Programme for the Protection of Human Rights Defenders Bill" currently being discussed at the Brazilian Congress,<sup>126</sup> the reality is that it is a secondary legislation – Decreto Presidencial nº 6.044/2007 – that currently regulates the Brazilian policy for the protection of human rights defenders. The problem concerns to the fact this legal instrument has significant potential limitations in regard to its broad applicability.

### CONCLUSION

This paper has presented the doctrinal legal framework, that is, the legal framework for the protection of human rights defenders as well as the legal design in which the public policy for the protection of human rights defenders operates in Brazil. It has also provided an overview of the UN and OAS human rights systems as well as the Brazilian legal system, and conducted an analysis of the presented legal frameworks as applied to the protection of human rights defenders in global, regional and Brazilian jurisdictions. *Table 2* describes depicts it below.

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<sup>124</sup> Sarlet (2004); Mendes et al (2008).

<sup>125</sup> "It is unfortunate that in real terms neither the return to democracy and sound legal framework for the defence of human rights, nor the presence of an active and experienced civil society has provided sufficient protection to human rights defenders or their activities. In their efforts to attain social, economic, environmental and cultural rights; in seeking to expose human rights violations and to end impunity for these violations; and in resisting discrimination or marginalization, human rights defenders continue to be threatened and harmed", in UN, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council"*, A/HRC/4/37/Add.2 of 19 December 2006, page 7 or paragraph 14. Available in English at: United Nations (UN) <<http://www2.ohchr.org/english/>> accessed 25 January 2016.

<sup>126</sup> Projeto de Lei (Bill) nº 4.575/2009. Câmara dos Deputados <<http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=564889>> accessed 25 January 2016.

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<b>Table 2 – The Rights of Human Rights Defenders under UN and OAS Human Rights Systems as well as Brazilian Constitutional Law</b>			
<b>Rights of Human Rights Defenders</b>	<b>Human Rights Systems</b>		<b>Brazilian Legal System</b>
	<b>United Nations (UN)</b>	<b>Inter-American (OAS)</b>	
The Right to be Protected	<ul style="list-style-type: none"> <li>- Article 2 of the Universal Declaration of Human Right (UDHR)</li> <li>- Articles 2, 9 and 12 of the UN Declaration on Human Rights Defenders (DHRD)</li> <li>- Article 2 of the International Covenant on Civil and Political Rights (ICCPR)</li> <li>- Article 3 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)</li> </ul>	<ul style="list-style-type: none"> <li>- Article 1 of the American Convention on Human Rights (ACHR)</li> </ul>	<ul style="list-style-type: none"> <li>- Article 5, <i>caput</i>, X and XLI of the 1988 Brazilian Constitution.</li> </ul>
The Right to Freedom of Assembly	<ul style="list-style-type: none"> <li>- Article 20(1) of the Universal Declaration of Human Right (UDHR)</li> <li>- Articles 5 and 12 of the UN Declaration on Human Rights Defenders (DHRD)</li> <li>- Article 21 of the International Covenant on Civil and Political Rights (ICCPR)</li> <li>- Article 5 (d) (ix) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)</li> <li>- Article 15 of the Convention on the Right of the Child (CRC)</li> </ul>	<ul style="list-style-type: none"> <li>- Article 15 of the American Convention on Human Rights (ACHR)</li> </ul>	<ul style="list-style-type: none"> <li>- Article 5, XVI, of the 1988 Brazilian Constitution.</li> </ul>
The Right to Freedom of Association	<ul style="list-style-type: none"> <li>- Article 20 of the Universal Declaration of Human Right (UDHR)</li> <li>- Articles 5 of the UN Declaration on Human Rights Defenders (DHRD)</li> <li>- Article 22 of the International Covenant on Civil and Political Rights (ICCPR)</li> <li>- Article 8 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)</li> <li>- Article 7 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)</li> <li>- Article 2 of the Convention n.º 87 on the Freedom of Association and Protection of the Right to Organize of the International Labour Organization, 1948 (Co87)</li> </ul>	<ul style="list-style-type: none"> <li>- Article 16 of the American Convention on Human Rights (ACHR)</li> </ul>	<ul style="list-style-type: none"> <li>- Article 5, XVII, XVIII, XIX and XX, of the 1988 Brazilian Constitution.</li> </ul>
The Right to Access and Communicate with International Bodies	<ul style="list-style-type: none"> <li>- Article 11 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (OP-CEDAW)</li> <li>- Articles 5(c) and 9(4) of the UN Declaration on Human Rights Defenders (DHRD)</li> <li>- Article 15 of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OP-CAT)</li> <li>- Article 13 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR)</li> </ul>	-----	-----
The Right to Freedom of Movement	<ul style="list-style-type: none"> <li>- Article 13 of the Universal Declaration of Human Right (UDHR)</li> <li>- Articles 5(c) and 9(4) of the UN Declaration on Human Rights Defenders (DHRD)</li> <li>- Article 12 of the International Covenant on Civil and Political Rights (ICCPR)</li> <li>- Article 5(d)(i) of the Convention on the Elimination of All Forms of Racial Discrimination (ICERD)</li> <li>- Article 26 of the Convention relating to the Status of Refugees</li> </ul>	<ul style="list-style-type: none"> <li>- Article 22 of the American Convention on Human Rights (ACHR)</li> </ul>	<ul style="list-style-type: none"> <li>- Article 5, XV and LXXVIII, of the 1988 Brazilian Constitution.</li> </ul>
The Right to Freedom of Opinion and Expression	<ul style="list-style-type: none"> <li>- Article 19 of the Universal Declaration of Human Right (UDHR)</li> <li>- Article 6 of the UN Declaration on Human Rights Defenders (DHRD)</li> <li>- Article 19 of the International Covenant on Civil and Political Rights (ICCPR)</li> <li>- Article 5(d)(viii) of the Convention on the Elimination of All Forms of Racial Discrimination (ICERD)</li> <li>- Article 13 of the Convention on the Rights of the Child (CRC)</li> </ul>	<ul style="list-style-type: none"> <li>- Article 13 of the American Convention on Human Rights (ACHR)</li> </ul>	<ul style="list-style-type: none"> <li>- Article 5, IV, VI and IX, of the 1988 Brazilian Constitution.</li> </ul>
The Right to Protest	<ul style="list-style-type: none"> <li>- Article 8 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)</li> <li>- Article 5(a) of the UN Declaration on Human Rights Defenders (DHRD)</li> <li>- Article 11 of the Convention n.º 87 on the Freedom of Association and Protection of the Right to Organize of the International Labour Organization, 1948 (Co87)</li> </ul>	<ul style="list-style-type: none"> <li>- Article 27 of the Inter-American Charter of Social Guarantees of 1948</li> <li>- Article 8(1)(b) of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988 (AP-ACHR-ESCR)</li> </ul>	<ul style="list-style-type: none"> <li>- Article 5, XVII, XVIII, XIX and XX, of the 1988 Brazilian Constitution.</li> <li>- Article 9, Paragraphs 1 and 2, of the 1988 Brazilian Constitution.</li> <li>- Article 37, VI and VII, of the 1988 Brazilian Constitution</li> </ul>
The Right to Develop and Discuss New HR Ideas	<ul style="list-style-type: none"> <li>- Article 7 of the UN Declaration on Human Rights Defenders (DHRD)</li> </ul>	-----	<ul style="list-style-type: none"> <li>- Article 5, XIV, XXXIII, LXXVII, and LXXVII, of the 1988 Brazilian Constitution.</li> </ul>
The Right to an Effective Remedy	<ul style="list-style-type: none"> <li>- Article 8 of the Universal Declaration of Human Right (UDHR)</li> <li>- Article 9 of the UN Declaration on Human Rights Defenders (DHRD)</li> <li>- Article 2(3) and 9(5) of the International Covenant on Civil and Political Rights (ICCPR)</li> <li>- Articles 13 and 14 of the Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT)</li> <li>- Article 6 of the Convention on the Elimination of All Forms of Racial Discrimination (ICERD)</li> </ul>	<ul style="list-style-type: none"> <li>- Article 25 of the American Convention on Human Rights (ACHR)</li> <li>- Article 4(g) of the Inter-American Convention on Violence against Women (Convention of “Belem do Para”)</li> </ul>	<ul style="list-style-type: none"> <li>- Article 5, V, X and XXXV, of the 1988 Brazilian Constitution.</li> </ul>
The Right to Access Funding	<ul style="list-style-type: none"> <li>- Article 6(f) of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief</li> <li>- Article 3 and 13 of the UN Declaration on Human Rights Defenders (DHRD)</li> </ul>	-----	-----

The table shows there is only soft law specifically regulating the protection of human rights defenders globally. Despite the lack of a specific (international or regional) human rights treaty (hard law) for the protection of human rights defenders, the existing international

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and regional human rights treaties can and should be used for the protection of human rights defenders and their work in the promotion and protection of human rights locally, regionally, and globally. Once ratified by States and internalized into their respective domestic jurisdictions, these international and regional human rights instruments provide the legal ground to demand States to fulfil their negative and positive obligations towards human rights and human rights defenders.

As it seems, the current specific international human rights instrument available, that is, the *UN Declaration on Human Rights Defenders*, might not be strong enough – once it is soft law (non-binding), not hard law (binding) – to make States take concrete measures to protect human rights defenders. As Brazil's case has demonstrated, it was only due to pressures exerted by (national and transnational) civil society organizations that the Brazilian government created the *Brazilian Programme for the Protection of Human Rights Defenders* back in 2004.<sup>127</sup> Law *per se* did not force the Brazilian government to create that protection programme. *What does this mean exactly?* It means soft law can be turned into a reference point from which transnational and domestic human rights advocacy networks can exert pressure on States and bring about human rights change. In other words, occasionally soft law can influence policy change domestically. Although soft law is non-binding, it provides principles and guidance for social movements, transnational and national human rights advocacy networks and UN and inter-American bodies in order for them to exert pressure on national states and bring about policy change. It seems to be the case of Brazil, which created the *Brazilian Programme for the Protection of Human Rights Defenders* due to internal and international pressures based on a human rights discourse on the grounds of the *UN Declaration on Human Rights Defenders*.<sup>128</sup> This is not to say, however, there is no need for specific hard law to regulate the protection of human rights defenders. A specific international human rights instrument could contribute even more to the protection of human rights defenders.

In any sense, now this final section makes the point Brazil's human rights obligations stipulate everyone under the Brazilian jurisdiction must be protected, particularly human rights defenders who carry out the fights for democracy, human rights and social justice. In theory, the current available laws within Brazil's legal system might be enough to demand the State take action regarding the protection of human rights defenders and their work in the

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<sup>127</sup> For a political history of the *Brazilian Programme for the Protection of Human Rights Defenders* see Terto Neto (2016).

<sup>128</sup> *ibid.*

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promotion and protection of human rights. This due to fact Brazil has ratified and internalized the majority of international and regional human rights instruments in observance of Brazilian constitutional law. Brazil is, therefore, committed to international human rights law. Nonetheless, this is not to say the passing of the “Brazilian Programme for the Protection of Human Rights Defenders Bill” into primary legislation is unnecessary. Specific primary legislation regulating the public policy for the protection of human rights defenders and their work could strengthen the *Brazilian Programme for the Protection of Human Rights Defenders* and, thus, significantly contribute to the empowerment of human rights defenders in Brazil. The fact that primary legislation is still needed for the protection of human rights defenders reveals that problems regarding human rights violations and state and non-state violence against human rights defenders seem to be ones of compliance, not of commitment to international human rights law, in Brazil.<sup>129</sup> This means that those problems go beyond law itself. They relate to the formation of Brazilian society and, as such, they must be tackled by State and civil society together.

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<sup>129</sup> See Terto Neto (2016); Risse, Ropp, and Sikkink (2013 and 1999).

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