

ENVIRONMENTAL DEFENDERS IN COLOMBIA AND ABDUCTIVE REASONING IN THE ACCESS TO JUSTICE

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ABSTRACT

The aim of this study is to analyze environmental defenders' right of access to justice in Colombia using abduction, a form of inference discovered by philosopher Charles Sanders Peirce. A qualitative methodological approach is adopted to analyze the data using the technique of "Discourse Analysis." Its application to selected sources (Colombian law, international law and official documents) helps to construct a definition of environmental defender in accordance with the domestic legal system. However, the article 9 of the Escazú Agreement provides a structured definition that allows remedying the lack of a precise legal definition of environmental defender in Colombian Law. This legal gap hinders the protection of those who defend the environment and natural resources. Addressing this obstacle requires to first analyze the effects of the Escazú Agreement and then to examine an alternative type of logic. Finally, we conclude that interpreting the article 9 of the Escazú Agreement using abductive inference would enable the judiciary to guarantee the environmental defenders' right of access to justice.

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*DEFENSORES AMBIENTAIS NA COLÔMBIA E RACIOCÍNIO
ABDUTIVO NO ACESSO À JUSTIÇA*

RESUMO

O objetivo deste artigo é analisar o direito de acesso à justiça para os defensores ambientais na Colômbia por meio de abdução, um modo de inferência descoberto pelo filósofo Charles Sanders Peirce. Adotando uma abordagem metodológica qualitativa, a técnica de análise de dados selecionada é “Análise do Discurso”; sua aplicação a fontes (normas do direito colombiano e internacional e documentos oficiais) permite a construção de uma definição de defensor ambiental de acordo com o direito interno; no entanto, o artigo 9º do Acordo de Escazú fornece uma definição estruturada que corrige imprecisões na legislação colombiana. Esse vácuo legal é uma lacuna para defender aqueles que protegem o território e os recursos naturais. Assim, para superar esse obstáculo, é necessário, primeiro, analisar os desenvolvimentos do Acordo de Escazú e, posteriormente, estudar um tipo de lógica alternativa. Finalmente, esta disposição se concluída pode resolver os problemas de acesso dos defensores ambientais através do raciocínio abductivo.

Palavras-chave: *Acordo de Escazú; Colômbia; defensor ambiental; raciocínio abductivo; violação dos direitos humanos.*

INTRODUCTION

This article examines the access to justice of environmental defenders in Colombia³ using an argumentative approach based on the abductive reasoning (PARK, 2016) discovered by C.S. Peirce (1878), in which to the two types of inferences – that is, induction and deduction – the philosopher adds a third one, called hypothesis, which starts from a result and a general rule to achieve an understanding of facts (see Table 1 below). According to Copi (2014), the building blocks of reasoning are called propositions and are manifested, in a very simple way, in syllogism⁴; in law, as “legal syllogism” (KLUG, 2019). In this context, to achieve our research objectives, we adopted a scientific qualitative approach (HERNÁNDEZ SAMPIERI; FERNÁNDEZ COLLADO; BAPTISTA LUCIO, 2014, p. 7-10), taking the legal norm as a unit of analysis or minimum element of study (CAVANAGH, 1997; ROTH, 2015), and collected data in Colombian legal documents, international instruments and press releases. We chose the method of “Discourse Analysis” – DA (WODAK, 2001a) for examining the collected data, as it allows an in-depth analysis of context (WODAK, 2001b) and of the propositional structures (VAN DIJK, 2001). Brown and Yule (1983) argue that DA encompasses many research activities and disciplines ranging from the obvious, such as linguistics, to complex psychosocial phenomena related to language; according to Renkema (2004) DA addresses the relationship between function and form – although other authors dissociate them – in communication, although van Dijk (1983) complexifies the analysis, arguing that this methodology is a “transdisciplinary science” because it includes in its approach texts, messages and conversations, employing social science theory in general. In fact, according to

3 A definition by Lozano (2018) is as follows: “*Who are the environmental defenders? Why is their protection necessary?* / *Environmental defenders* are persons or groups that exercise their own fundamental human rights (such as to freedom of expression and assembly or to access to information and environmental justice) to protect another right that has a strong collective content: the right to a healthy environment. Their activities are supported by the 1998 United Nations Declaration on Human Rights Defenders” (emphasis added).

4 “In logic, argument refers strictly to any group of propositions of which one is claimed to follow from the others, which are regarded as providing support for the truth of that one. / [...] In writing or in speech, a passage will often contain several related propositions and yet contain no argument. An argument is not merely a collection of propositions; it is a cluster with a structure that captures or exhibits some inference. We describe this structure with the terms conclusion and premise. The conclusion of an argument is the proposition that is affirmed based on the other propositions of the argument. Those other propositions, which are affirmed (or assumed) as providing support for the conclusion, are the premises of the argument. [...] Those who defend these arguments, or who attack them, are usually aiming to establish the truth (or the falsehood) of the conclusions drawn. As logicians, however, our interest is in the arguments as such” (COPI; COHEN; MCMAHON, 2014, p. 6).

Grandi (1995), DA is the best approach to analyze multiple messages that, together, form a single discourse; what really matters here is the quality of the unit of analysis and not the quantitative dimension, thus focusing primarily on style, structure and the possible interconnections between the parts of the discourse.

In short, DA addresses the rules and strategies established in legal norms as an institutional discourse, allowing the opportunities offered by certain international instruments to be articulated with the visibility required by environmental defenders in Colombia. A qualitative approach fits the proposed methodology, as it allows to relate the Escazú Agreement – EA (2018) with the situation of environmental defenders and the factual – e.g., the systematic assassination of social leaders – and legal circumstances that, *prima facie*, hinder the agreement’s application, although they might also provide alternatives.

The precarious protection of environmental defenders is partly due to the lack of a precise definition in the Colombian legislation. Nevertheless, there are elements to establish a precise definition based on EA’s art. 9, which the government of President Ivan Duque initially refused to sign (COLOMBIA NO SUSCRIBIRÁ..., 2019), only to be recently forced to do so by the pressure of social movements (2019) (Figure 1). Colombia now has a technical definition of the term environmental defender that can be complemented by international instruments and by the legal definition of “social leader”⁵ (PRESIDENCIA DE LA REPÚBLICA DE COLOMBIA, 2018a).

AGENDA	
12 Diciembre	Evento de divulgación de la firma del Acuerdo de Escazú Bogotá, Colombia

Figure 1 Agenda.

Source: Presidency of the Republic of Colombia (2019)⁶.

⁵ In Colombia, “social leader” refers to political and human rights activists. In addition, there is a slightly more poetic definition, which highlights their work in changing social reality: “A social leader is the union of communities. It is he who adds value to the territories. It is he who, day to day and even on nights and holidays, uses his time and that of his family to organize, to give ideas, to open the small paths that together with all other paths form the great course of the country” (GONZÁLEZ URIBE, 2018).

⁶ Thus, it is important to use DA to analyze the problems caused by this delay in signing the Agreement, since Iván Duque’s government officially refused to sign it and the “speech” posted on the official

EA's art. 9 has an interesting history. EA's 7th negotiation meeting had defined the term defender in a glossary provided in its art. 2nd (CEPAL, 2017, p. 15)⁷. But at the 8th Meeting this changed⁸ and the definition was almost excluded from the Agreement's final version; until the 9th Meeting (CEPAL, 2018)⁹, art. 9 was entitled: "Defender of human rights in environmental issues." The defenders' weakness lies in their precarious access to justice, a temporary regulatory void becomes a political issue and, for this reason, the little attention given by governments to defenders forces them to act based on philosophy. Such is the case of abduction (see above), which is very useful in legal matters, since it optimizes regulatory integration by establishing an objective linked to a robust and consistent definition that allows the situation of environmental defenders to be visible to all legal operators. In addition, this study responds to a desperate need of defenders, which demands hermeneutical methods or solutions¹⁰.

And because the relationship between human rights and sustainability in Latin America and the Caribbean (CORTE IDH, 2017a) influences how the systematic violence against environmental defenders is perceived (WATTS, 2018), it is necessary to understand that the EA's structure itself sustains that the right of access to justice emanating from Principle 10 of the Rio Declaration (1992) support the EA's definition of environmental defenders; and also that they should have access to: environmental information (art. 5), decision-making (art. 7) and justice (art. 8)¹¹. EA's objective is to implement these rights in the region (art. 1), under the principles

website of the Presidency blatantly states the following: "At the end of the ceremony in New York, Ambassador Fernández de Soto pointed out that 'the signing of this instrument ratifies President Duque's unwavering commitment to promoting human rights and protecting the environment. It also marks a historic moment in Colombia's efforts to achieve the United Nations' Sustainable Development Goals". Since November 21, strong street protests across Colombia have produced a strong social pressure that has forced the country's government to reconsider its refusal to sign the Escazú Agreement.

7 The draft provision stated: "'Human rights defenders in environmental matters' means individuals, groups or social organizations working to protect and promote the environment and related human rights".

8 This is told in footnote 10 of ECLAC's working documents: "At the eighth meeting of the negotiating committee, the countries agreed to work on the following definitions: access rights, competent authority, environmental information, public, and persons or groups in vulnerable situations. They also agreed to discuss the definition of human rights defenders in environmental matters within this article".

9 Art. 9. Human rights defenders in environmental matters / 1. Each Party shall guarantee a safe and enabling environment for persons, groups and organizations that promote and defend human rights in environmental matters, so that they are able to act free from threat, restriction and insecurity.

10 DA addresses the uncertainty about certain norms that unambiguously define environmental defenders.

11 This also includes, among other provisions of the same agreement, information dissemination (art. 6) until an interstate clearing house is established (art. 12).

(art. 3) of equality, good faith and non-regression, among others, and to strengthen the environmental capacities of each Party (art. 10), by promoting their cooperation (art. 11). The agreement foresees the commitment of all Parties to its implementation (art. 13); establishes the “Conference of the Parties” (arts. 15, 18 and 19), an administrative and control body, where the Parties vote (see art. 15)¹². Finally, none of this would be possible, however, without environmental defenders to promote the agreement’s effectiveness after its signature and subsequent ratification.

Within the region, Colombia deserves special attention due to the proliferation of environmental conflicts (CALDERÓN-VALENCIA; ESCOBAR-SIERRA; BEDOYA-TABORDA, 2019) and to the “post-conflict” situation (CONSEJO NACIONAL DE POLONICA ECONÓMICA E SOCIAL, 2015a) that resulted from the Peace Agreement (2016)¹³, which did not end the conflict¹⁴, and on the contrary, revealed other criminal activities: illegal mining, illicit plantations, deforestation (CONSEJO NACIONAL DE POLÍTICA ECONÓMICA Y SOCIAL, 2015b), paramilitary groups and the emergence of new episodes of violence (SÁNCHEZ LEÓN *et al.*, 2018). The signing of the peace agreement thus marked the beginning of a surge of threats and assassinations of social leaders (FORST, 2018); among them, many defending their territories and the environment (IEMP; PROCURADURÍA GENERAL DE LA NACIÓN, 2018; US DEPARTMENT OF STATE, 2017).

The situation resulting from the Peace Agreement presents paradoxes such as an increase in both mining and tourism; the “pacification” of areas previously occupied by the FARC-EP also created economic opportunities derived from land grabbing and the illegal expansion of agriculture (SANCHEZ AYALA, 2018). Due to the weakness of the state in these areas, controls over extractive activities are merely formal (OLMOS, 2018), and it is difficult to prevent the deforestation that precedes extractive and ranching activities, given the institutional weakening of local autonomy (CORTE CONSTITUCIONAL COLOMBIANA, 2018a, 2019), despite the rise of biocentrism (CORTE CONSTITUCIONAL COLOMBIANA, 2016a; CORTE SUPREMA DE JUSTICIA, 2018)¹⁵. In addition, there is

12 In addition, a voluntary fund was established (art. 14).

13 The parties to this agreement were the Colombian State and the former FARC-EP guerrilla.

14 Its importance for Colombia is not disputed, but the lack of care in its implementation and the State’s little capacity to implement it are frustrating.

15 Biocentrism in Colombia was popularized by the 2016 T-622 trial, thanks to developments in Latin America (SILVA; VERDAN RANGEL, 2017), but some failures still persist, such as the protection of the Cauca River (2019).

the typical dynamics of emerging criminal gangs, which alternate drug trafficking with illegal mining (SÁENZ, 2018).

In Colombia, environmental defenders face state, parastatal and anti-state threats (UNODC; GOBIERNO DE COLOMBIA, 2017). The number of attacked social leaders is continuously rising and environmental defenders are among the victims; they are either criminalized or the attacks on them are confused with everyday incidents – such as passion crimes, street fights, robberies, etc. (COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, 2015; GLOBAL WITNESS, 2019). This situation is an obstacle to access to justice; it does not sound strange to affirm that “Colombia seems to prefer economic benefits to peace” (GLOBAL WITNESS, 2017)¹⁶. All this makes natural resources and territories more vulnerable to exploitation (JUSTIÇA AMBIENTAL ATLAS, 2018), since those who demand full enforcement of constitutional provisions are being exterminated.

To achieve the proposed objective, in addition to this introduction, this study is divided into sections as follows: (1) a study that contrasts current regulations with definitions of environmental defenders and other activists, in order to address (2) the application of abductive reasoning to the right of access to justice, and finally (3) a conclusion.

1 LEGAL NORM AND INTERPRETATION IN THE DEFINITION OF ENVIRONMENTAL DEFENDERS

According to Global Witness (2017), an environmental defender is anyone who protects land and environmental rights, voluntarily or professionally¹⁷. For the UN (ONU, 2019), it is anyone who defend environmental rights and even constitutional rights whose implementation promotes a healthy and clean environment¹⁸; by extension, it includes activists and environmental leaders, who are awarded the “Green Nobel” for their work (GOLDMAN FUND, 2019). Above all, being a defender of the environment means being a defender of human rights: a person whose “position of social leadership is based on two pillars: the specific activity that person

¹⁶ As mentioned in the report: “Colombia: profit over peace [...] Colombia had its worst year on record, in spite – or perhaps because – of the recently signed peace deal”.

¹⁷ “UN Environment considers an environmental defender to be anyone who is defending environmental rights, including constitutional rights to a clean and healthy environment, when the exercise of those rights is being threatened” (UNEP, 2019).

¹⁸ The excerpt from the Global Witness report states: “anybody who takes peaceful action, either voluntarily or professionally, to protect environmental or land rights”.

performs and the recognition that this activity is carried out by the community of which that person is part” (CINEP/PPP *et al.*, 2018, p. 8); a defender conducts, coordinates or supports “processes or activities of a collective nature that positively affect the life of the community, improve and dignify its living conditions or build social fabric,” without necessarily depending on a salary. In terms of doctrine, what is essential is their work and what it means for their communities; “social leaders are the soul of the territories [...] they are the hope of peace in the current Colombian historical context [...]” (CAJAR, 2018, p. 3). Often, social leaders’ work improves or even takes the place of state authority, since it is their responsibility to

[...] implement human rights, promote development, defend the environment, demand cultivation replacement, encourage the effective participation of citizens, [they] are builders of peace and of the social fabric, [they] fight against illicit economic activities, carry out citizen supervision, participate in peasant, indigenous, Afro-descendant and community organizations, among others; their complex social function is to seek to strengthen democracy and the collective enjoyment of rights (CAJAR, 2018, p. 9).

Despite the consistency of these definitions, they are still not legally regulated in Colombia, creating uncertainty for lawyers, authorities and for defenders themselves (MIDDELDORP; LE BILLON, 2019). Environmental defenders need to be officially recognized, thus obligating the State to ensure their protection, an objective supported by the rules of the Inter-American System, which establish obligations such as: respecting, preventing, protecting against risks and, finally, the duty to investigate, judge and punish (CIDH, 2011). These standards for protecting defenders were, in fact, born out of a system whose functioning drove the evolution of various mechanisms (CIDH, 2017a).

1.1 Inter-American standard and the protection of human rights defenders

Since the late 20th century, the IACHR has made a strong contextual-historical effort to identify causes and effects of violence against defenders, based on four charges against the State, related to obligations to: respect, prevent, protect against risk and, finally, investigate, prosecute and punish those who commit crimes against human rights defenders (CIDH, 2017a). Some of the standards’ generalities were *built* in the case of *Luna López vs. Honduras* (CORTE IDH, 2013, par. 117-118); the Court expanded the

duty of prevention by including measures to promote the safeguarding of defenders' rights, which can be cultural, legal, political and administrative; established as an "obligation [...] to ensure" (OEA, 1969; see art. 1). This last obligation has a positive nature, imposing a burden on the State¹⁹, which was inspired and followed by emblematic reports such as report no. 24/98 (CIDH, 1998)²⁰ or, more recently, the report no. 35/17 (CIDH, 2017b). The standards apply to three axes: obligation to prevent, legal guarantees and the right to personal integrity (CIDH, 2016)²¹. These axes are harmonized by risk management, if they are known to the State, but they also extend to private acts (CORTE IDH, 1988, par. 175)²². Since the case of *Acosta et al. vs. Nicaragua* (CORTE IDH, 2017b), the Court established clear rules: in case of aggressions against the defender's family, these aggressions are understood as a product of a context of hostilities against him, and not as a fortuitous and isolated case, whenever there are indications in this regard. Likewise, the criminalization of defenders was considered a means of intimidation, contrary to the Convention's principles, since the sentence in the case of *Uzcátegui et al. vs. Venezuela* (CORTE IDH, 2012).

All States that have joined the Inter-American System must protect defenders (CIDH, 2017a, para. 56-64), due to their particular situation of vulnerability. In addition, States must take action to eliminate or address the "structural causes" that endanger the security of defenders, female leaders and social leaders (CIDH 2017b, para. 152). Thus, inter-American norms enable the creation and preservation of minimum conditions

19 This issue is possibly outside the scope of this study, but the genealogy of this measure can be traced to cases submitted to the Inter-American Court, such as *Villagrán Morales et al. (Street Children) vs. Guatemala* or *Castillo González et al. vs. Venezuela*. Likewise, other measures have been established considering previously imposed measures (CIDH, 2017a, para. 58-64).

20 See parag. 1, 49-53.

21 IACHR Report no. 7/16 addresses the particular situation of "journalists," but many of the standards set for defenders are similar to theirs; see parag. 136 and 137, where States are asked to maintain a public discourse that does not condemn or generate social unrest against the press and media workers.

22 It is better to quote the same Court to understand the right of prevention in the case of *Velásquez Rodríguez vs. Honduras*: "175. This duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages. It is not possible to make a detailed list of all such measures, since they vary with the law and the conditions of each State Party. Of course, while the State is obligated to prevent human rights abuses, the existence of a particular violation does not, in itself, prove the failure to take preventive measures. On the other hand, subjecting a person to official, repressive bodies that practice torture and assassination with impunity is itself a breach of the duty to prevent violations of the rights to life and physical integrity of the person, even if that particular person is not tortured or assassinated, or if those facts cannot be proven in a concrete case".

for implementing the Convention, obligating States to establish comprehensive policies of prevention and protection against any disturbance or aggression.

Three categories were identified to receive special protection (CIDH, 2017a, para.155), including “those who are at extraordinary or extreme risk as a result of their political, public, social, or humanitarian activities or functions” (p.100). However, the problem lies in the fact that there is little or no certainty that defenders must be beneficiaries of protection (BIRSS, 2017); although the same specific IACHR report on defenders commemorates that Colombia has launched a protection program for that purpose (CIDH, 2017a, p. 99 –100; see also, para.166, footnote 252), the ordinance to that purpose does not expressly recognize the guarantee of protection for environmental defenders.

Now, after the signing of the EA on December 12, 2019, Colombia is expected to increase efforts to implement international law – which would then become domestic law due to the constitutional process for ratification of international treaties by the Congress of the Republic (see art. 150, n.16²³), according to art. 164²⁴ of the 1991 Constitution – and to adequately protect environmental defenders. For this reason, it is also necessary to identify the elements that make it possible to build a good definition of environmental defenders.

1.2 Contributions of international norms and instruments

Before the EA, the difficulty in defining environmental defenders was due, in part, to the complex regulatory framework for human rights defenders. Although they are defined generically in *Resolution A/RES/53/144* (1999), its parameters for the definition are paradoxical (ONU, 2019). First, *identity* is confused with *activity* (CINEP/PPP *et al.*, 2018) and, second, there are no minimum requirements to be a human rights defender, suggesting that their activity is also undetermined. In fact, the definition of defender is at the mercy of purely subjective elements²⁵ such as recognition

23 Art. 150. Congress shall be responsible for making laws. Through them, it shall perform the following functions: [...] / 16. It approves or rejects the treaties that the Government signs with other States or with legal international entities. Through these treaties, the State can, based on equity, reciprocity and national convenience, partially transfer certain powers to international organizations that aim to promote or consolidate economic integration with other States”.

24 “Art. 164. Congress shall give priority to proceedings for enacting bills that approve human rights treaties submitted for its consideration by the Government”.

25 Art. 1 of resolution A/RES/53/144 attributes the nature of a defender to “Everyone”. Everyone has the right to receive protection in order to “[...] promote and to strive for the protection and realization

(COORDINACIÓN COLOMBIA EUROPA ESTADOS UNIDOS, 2018) or social utility (CAJAR, 2018). In resolution *A/RES/53/144*, “individuals, groups and associations [that contribute to] the effective elimination of all violations of human rights and fundamental freedoms of peoples and individuals” form the basis of the definition (see preamble paragraph). They have a professional character and another one outside the work activity (see section B, ONU 2019)²⁶. Likewise, the condition of *person* encompasses groups and institutions.

Recently, EA’s art. 9 introduced a definition of the term environmental defender based on three positive state obligations: (i) guarantee a safe and enabling environment so that they can act free from threats, restrictions and insecurity; (ii) take effective and adequate measures to recognize, protect and promote all rights; (iii) take appropriate, effective and timely measures to prevent, investigate and punish attacks, threats or intimidation that human rights defenders in environmental matters may suffer while exercising the rights set out in the Agreement. As we have seen, the provisions of art. 9 comply with the Inter-American System standards (see 1.1 above). The recent signing of the instrument by the government makes it possible to protect defenders by applying the definition and ensures the compliance with the decisions of the Inter-American Court and Commission.

The EA establishes obligations to “guarantee conditions” for the free exercise of defenders’ activities and to “take measures” in their favor, demanding that “all” their rights be protected – e.g. “life, personal integrity, freedom of opinion and expression, peaceful assembly and association, and free movement” – although emphasizing access rights. In turn, item 3 of art. 9 establishes that States must take measures to prevent irreparable damage, resulting from attacks, threats or acts of intimidation, due to their activity, an essential element of the definition. Preventive and reactive protection should be guaranteed, in conformity with with the norms of the

of human rights and fundamental freedoms at the national and international levels”. People have the right to state protection as provided for in domestic law (art. 3) and defenders, individually or in association (art. 6), have the right to assemble, associate and communicate (art. 5).

26 “The most obvious human rights defenders are those whose daily work specifically involves the promotion and protection of human rights, for example human rights monitors working with national human rights organizations, human rights ombudsmen or human rights lawyers. / However, what is most important in characterizing a person as a human rights defender is not the person’s title or the name of the organization he or she works for, but rather the human rights character of the work undertaken. It is not essential for a person to be known as a “human rights activist” or to work for an organization that includes ‘human rights’ in its name in order to be a human rights defender. Many of the staff of the United Nations serve as human rights defenders even if their day-to-day work is described in different terms, for example as ‘development.’ Similarly, the national and international staff of NGOs around the world working to address humanitarian concerns can typically be described as human rights defenders”.

Inter-American System, although one element is recurring: a particular interest in access rights in item 3.

Regarding this recurring element, there are two points of view to be examined. First, the aforementioned obligations protect environmental defenders, striving to prevent threats and intimidation – that is, potential violence – but also guaranteeing that attacks already perpetrated – that is, damage done – are punished and repaired. Second, in the EA, the identity of the environmental defender is merged with the rights of access to justice in environmental matters (CEPAL, 2018, art. 8), participation in environmental decision-making (art. 7) and access to environmental information (art. 5 and 6).

Therefore, the most recent foundations provided for in international law also assimilate environmental defenders into their work. One might incorrectly think that the innovation of EA's art. 9 is more related to activity than to the benefits provided to society; however, the opposite is true. Its contribution to the special protection of environmental defenders is stating that they are facilitators or promoters of access rights; these rights are addressed in the Principle 10 of the Rio Declaration (1992) and allow the characterization of an individual or group as a defender of the environment.

A critical view of the issue is that the right of access to information can aggravate the situation of defenders, because their interests are merged with the interests of the community (CALDERÓN-VALENCIA; ESCOBAR-SIERRA; BEDOYA-TABORDA, 2019) and this puts their protection at risk, making it diffuse and confused with that of an indeterminate number of individuals. Certainly, such confusion is justified because of the complex nature of the environment right to the environment, which, according to the Inter-American Court, is a fundamental and collective right (2018a)²⁷. But this confusion between the *direct beneficiaries of the*

²⁷ “This Court recognized the existence of an undeniable relationship between the protection of the environment and the realization of other human rights, as environmental degradation affects the effective enjoyment of human rights. Likewise, the relationship of interdependence and indivisibility between human rights, the environment and sustainable development was highlighted, as the full enjoyment of all human rights depends on an enabling environment. Thanks to this close connection, it was found that currently (i) several human rights protection systems recognize the right to a healthy environment as a right in itself, while there is no doubt that (ii) several other human rights are vulnerable to environmental degradation, which implies a series of environmental obligations of States to fulfill their obligations to respect and guarantee these rights. / In the Inter-American Human Rights System, the right to a healthy environment is expressly enshrined in art. 11 of the Protocol of San Salvador: / 1. Everyone shall have the right to live in a healthy environment and to have access to basic public services. 2. The States Parties shall promote the protection, preservation, and improvement of the environment. / In addition, this right must also be considered included among the economic, social and cultural rights protected by art. 26 of the American Convention. / The human right to a healthy environment is a right with individual and collective connotations. In its collective dimension, it is a matter of universal interest, in view of present and future generations; although

defenders' activity and the defenders themselves enables anyone to request the protection of the right of access to justice, information and participation in environmental decision-making. Thus, not all of them can be considered defenders of the environment and the reason for this is simple: because, in that case, they could not receive special protection²⁸; if the above is accepted, the standard must be set by an *adequate measure* meeting three requirements (CORTE IDH, 2014, para. 157; 2018b, para. 193): (i) that the measures are in accordance with the functions performed by the defender; (ii) that the object of the measure is evaluated according to the level of risk, allowing the implementation of the measure and its subsequent monitoring; and (iii) that the protection measures can be modified according to the intensity of the risk, according to the sentence of the case *Yarce vs. Colombia* (CORTE IDH, 2016, para. 192-196, see also B.1.2.3.). Thus, the difficulty in ensuring protection for defenders lies in their normative characterization, since the legal framework is based on circumstantial criteria. This makes it difficult to prevent crimes against environmental defenders. Considering that EA's art. 9 states that "1. Each Party shall guarantee a safe and enabling environment for persons, groups and organizations that promote and defend human rights in environmental matters, so that they are able to act free from threat, restriction and insecurity," it is thus clear that the Colombian State was unable to comply with the burden imposed by the international community (CINEP/PPP *et al.*, 2018)²⁹.

its violation may have direct or indirect repercussions on persons, due to their individual dimension and their connection with other rights, such as the right to health, personal integrity and life, among other rights. Environmental degradation can cause irreparable damage to human beings, making a healthy environment a fundamental right for the existence of humanity. However, the right to a healthy environment as an autonomous right is different from the environmental dimension arising from the protection of other rights, such as the right to life or the right to personal integrity. Some human rights are more susceptible than others to environmental degradation. The rights especially linked to the environment have been classified into two groups: (i) rights whose enjoyment is particularly vulnerable to environmental degradation, also identified as substantive rights (for example, rights to life, personal integrity), (ii) rights whose exercise contributes to a better formulation of environmental policies, also identified as procedural rights (such as rights to freedom of expression and association, information and participation in decision-making, and to an effective remedy)".

28 A report by the Inter-American Court (2018c, para. 105) refers to a case involving protection for defenders in Honduras; the resolution of August 23, 2018 extended the previous measures, including of protection, to those who requested it.

29 The report *What are the standards? Post-contract murders of social leaders* (2018) focus on the period between November 24, 2016 – the signing date of the peace agreement – and July 31, 2018. This document reports many homicides and attacks, but the most worrying is that, even though the numbers are public and challenge the authorities, the number of defenders or social leaders affected continues to increase: 25 were murdered in the first quarter of 2019 – "245 incidents, including homicides, attacks and threats" (EL ESPECTADOR, 2019b). The report's sources should be approached with methodical doubt, however, since the report is based on the experiences of different organizations that defend human rights and the daily news is a sector of the Colombian written press. What is beyond doubt is the very high number of victims and attacks. The last victim reported while these lines

In turn, the second obligation defined in art. 9 basically consists of measures aimed at investigating crimes against defenders. The criterion specified in item 2 of art. 9 is the fulfillment of obligations derived from three sources: international law on human rights, constitutional principles and basic concepts of the domestic law of each State. In fact, by applying the principle of *International Good Faith*, Colombian authorities could guarantee special respect and protection for environmental defenders, regardless of whether the legislative body has ratified the Escazú Agreement, as have occurred with other instruments, such as the Agreement of Paris through Law no. 1,844 (2017).

In short, the demand for protection and the criticism of the current government's passivity in addressing the risk of extermination faced, in general, by social leaders and environmental defenders are mainly based on the principle of harmonization of international law (VARÓN, 2017, p. 97)³⁰. Despite the illusory effectiveness of international law, its objective is of utmost importance for legal operators in Colombia, thanks to the theory of the constitutional block supported by arts. 93 and 94 of the Colombian Political Constitution (CORTE CONSTITUCIONAL COLOMBIANA, 2003). As stated above, this is the first part of a study examining the elements of domestic law that allow a definition of environmental defender.

1.3 Contributions of Colombian norms to the definition of environmental defender

The Colombian legal system provides some elements for a formal definition of environmental defender, a corollary of this is the evolution of the notions related to the term due to the accelerated deterioration of protection guarantees since 2016 (CAJAR, 2018; CINEP/PPP *et al.*, 2018; IEMP; PROCURADURÍA GENERAL DE LA NACIÓN, 2018). Colombia made the term “social leader” fashionable (PRESIDENCIA DE LA REPÚBLICA DE COLOMBIA, 2018a)³¹ and received international publicity thanks to Michel Forst's visit³²; criticisms of the special mandate

are being written is Paula Rosero Ordóñez, a public attorney of Samaniego, department of Nariño (EL ESPECTADOR, 2019a), to whom is added another social leader in Putumayo (REDACCIÓN NACIONAL, 2019).

30 “Although the principle of harmonization of international law states that when several rules address the same issue those rules must be interpreted to produce a single series of compatible obligations, this is not an easy task for those who must apply international law in their decisions”.

31 In Colombia, “social leader” refers to political and human rights activists.

32 The visit brought strong international pressure to bear on Colombia and also resulted in the

coincide with *Resolution A/RES/53/144* and the achievements of Escazú (see above). Although Colombia's government have been neglecting the protection demanded by defenders (GONZÁLEZ POSSO, 2018), it seems to yield to international pressure and has received support from the judiciary (CORTE CONSTITUCIONAL COLOMBIANA, 2018b)³³. In fact, the systematic nature of crimes against these leaders is recognized (RTVC, 2019)³⁴, as well as the relationship between crime (FISCALÍA GENERAL DE LA NACIÓN, 2019) and lack of planning in the post-agreement (COL-PRENSA, 2019)³⁵.

The issuance of Presidential Decree no. 660 (2018a) provides some examples. Despite being the legal framework for protecting social leaders³⁶, the decree did not achieve immediate results (LA OPINIÓN, 2018), even though among its objectives is the protection of human rights defenders³⁷, such as the application of transitional justice (PRESIDENCIA DE LA REPÚBLICA DE COLOMBIA, 2017a). Likewise, Decree-Law no. 895 of 2017 (see articles 14 and 15) structures protection based on the

definitions of defender and “social leader,” which, respecting Colombian tradition, establishes a solid criterion for interpretation.

33 In this sense, it must be said that “in addition to the personal harm that victimizes social leaders, this type of action against them brings with it the social disintegration of the groups to which they belong, apathy and fear of expressing themselves and, finally, deterioration of community life, as the task of representatives, among others, is to generate a sense of identity and ownership in order to advance towards a social context more favorable to the development of productive projects” (see consideration 2.3, Colombian Constitutional Court, 2018b).

34 “To the National Pre-Commission for Security Guarantees, the nation’s attorney general Néstor Humberto Martínez pointed out that in 65% of the cases in the report presented and endorsed by the United Nations, criminal organizations are responsible for the murders of the country’s social leaders”.

35 “The authorities have already taken note of the murder epidemic that promises to be one of the challenges of the current government. A report by the Public Defender Office announced that to date seven social leaders have been murdered in Meta, Cauca, Vale do Cauca, Antioquia, Magdalena and Caquetá. / In a meeting held last Friday with the Nation’s Attorney General Néstor Humberto Martínez, the Attorney General Fernando Carrillo, the Public Defender Carlos Alfonso Negret and President Iván Duque, it was indicated that these numbers represent 238 social leaders murdered since January 2016. / Martínez acknowledged then that 50% of the murdered leaders are members of Community Action Boards. ‘It can be deduced that this is a massive system. This is produced by residual armed groups, the ELN and the ‘Clan del Golfo.’”

36 The paragraph of art. 2.4.1.7.1.6 of Decree 660 establishes the instruments to protect defenders: “The prioritization and targeting shall be reviewed annually by the committees that are the object of this chapter and may be articulated with the Prevention and Alert System for Rapid Reaction of the Ombudsman and the Intersectoral Commission for the Rapid Response to Early Alerts (CIPRAT)”.

37 Decree 660 also has two other aims. First, ensure the transition from conflict to post-conflict. Second, the political inclusion of the extreme left (see art. 16), as this fragment shows: “That the content of this Decree-Law is instrumental in nature, as its objective is to facilitate and guarantee the implementation and regulatory development of items 2.1.2 and 3.4 of the Final Agreement. Consequently, this Decree-Law meets the requirements of an objective, strict and sufficient connection with the Final Contract, as well as the requirement of strict need for its issuance [...]” (see 1. General Considerations, Presidencia de la República de Colombia, 2017b).

role of defenders as agents of peace (TRIBUNAL CONSTITUCIONAL DA COLOMBIANA, 2017, see Consideration no. 10.14.1.)³⁸. As a result, the elements provided by the regulations introduced by President Santos' government have a marked utilitarian character: social leaders are defined and protected in their personal integrity (CORTE CONSTITUCIONAL COLOMBIANA, 2012) for practical reasons (CORTE CONSTITUCIONAL COLOMBIANA, 2015). This position remains until today.

Providing a definition of environmental defender requires obtaining elements from the current legislation, starting with constitutional provisions and then examining ordinary and other laws. The Constitution and the Peace Agreement contribute to the environmental defender's definition with the criterion of equal protection by the State, especially with respect to the implementation and promotion of human rights. Analytically, the systematic elimination of defenders is a phenomenon linked to the signing of the Peace Agreements (see above 1), which highlights the relationship between the Constitution's preamble and its arts. 1, 2, 11, 22, 95 and, especially, art. 13, which enshrines equality as a right, linking it to affirmative protection actions. In addition, art. 79 is particularly relevant to environmental defenders, since the enjoyment of a healthy and balanced environment is directly linked to the protection of the women and men who guide the social processes of conserving fauna, flora, biodiversity and their own lifestyle in their communities (CALDERÓN-VALENCIA; ESCOBAR-SIERRA; BEDOYA-TABORDA, 2019). Other equally important principles complement the constitutional principles, such as points 2³⁹ and 3.4⁴⁰ of the Peace Agreement, which provide for state obligations such

38 "As described in the first part of this measure, there are some individuals who, depending on their activity or gender, are more vulnerable in case of internal armed conflict, such as women, ethnic groups, victims of political violence, community leaders and human rights defenders who were victims of violence perpetrated by armed actors. / According to reports from the Public Defender's Office, between January 1, 2016 and March 1, 2017, 156 human rights leaders and activists were killed; 5 are missing and 33 have been victims of attacks against their integrity and lives. According to this report, these incidents that resulted in victims occurred in 23 of the 32 departments and one of the main causes that explain this phenomenon is the stigmatization of these population groups, which increases the risk to which they are exposed, in addition to the efforts of illegal armed groups to expand their domain to areas where the FARC-EP returned to civilian life".

39 Item 2 of the Peace, Political Participation and Democratic Openness Agreement provides for "[...] the promotion of coexistence, tolerance and non-stigmatization, which guarantee the respect for democratic values".

40 Item 3.4 of the Peace Agreement addresses the "Security guarantees and fight against criminal organizations and conduct responsible for homicides and massacres, that attack human rights defenders, social movements or political movements or that threaten or attack people who participate in the implementation of the agreements and in peace-building, including criminal organizations that have been named successors to paramilitaries and their support networks".

as: (i) guaranteeing security, as well as (ii) taking constant and systematic actions aimed at combating criminal organizations and preventing attacks against defenders. The Peace Agreement provides for protection according to some guiding principles (see item 3.4.1.). Its normative function is linked to guarantees of non-repetition of crimes against human rights leaders and defenders, some of whom striving to conserve the territory and a healthy environment⁴¹.

Likewise, the normative production of the Colombian state in general can also provide elements to build a definition of environmental defender, including the rules introduced (1.3.1) before – or at the time – of the signing of the Peace Agreement (1.3.2) and others established due to the international pressure resulting from the UN’s special mandate visit mentioned above⁴².

1.3.1 Elements of the Colombian normative framework for a definition of environmental defender

When the assassination of human rights defenders became unbearable, a first type of rules was created, which were adopted in order to combat violence against this population group. Some examples are Decree-Law no. 154 (2017b)⁴³ and Decree-Law no. 895 (2017a)⁴⁴, and Directive no. 002, reinforced by documents issued by the Ombudsman’s Office (2017), such as the *Risk Report n. 010-17 A.I. of March 30, 2017* or the *Directive 012 of July 15, 2010* of the Attorney General’s Office (2017). However, the measures derived from them have been provided for in other regulations. Two of the first measures introduced to prevent crimes against defenders were (1.2.1.1) the Protection Program and (1.2.1.2) the Early Warning System (SAP).

41 Item 2 of the Peace Agreement insists on the dismantling of paramilitarism, especially in the *Principle of Guarantees of Non-Repetition*. The Agreement insists on this form of parastatal violence as an obstacle to its implementation. The emergence of paramilitarism hinders the promotion of human rights (*Principle of respect, guarantee, protection and promotion of human rights*) and the preservation of public order as regularization of the rule of law (*Principle of guaranteeing the monopoly of force and the use of weapons by the State throughout the territory*) and of justice (*Principle of strengthening the administration of justice*) in a country where the strongest rule because they do not respect the rules, or impose the rules on their own.

42 The special delegate’s visit took place between November 20 and December 3, 2018.

43 Establishes the National Commission on Security Guarantees (CNGS) and develops the Peace Agreement.

44 In the same vein, the national government introduced regulations such as Decree 2,252 (2017) and mechanisms such as the *Intersectoral Commission on Guarantees for Women Leaders and Human Rights Defenders* (2016) had been established to facilitate the protection of all types of defenders.

1.3.1.1 The Protection Program: protective measures for people in situations of vulnerability

Initially, Law no. 418 (1997) structures the Protection Program aimed at defenders and social leaders, empowering the Ministry of Interior to implement the program to protect people in situations of vulnerability arising from their political affiliation in the context of the internal armed conflict in Colombia. Unlike recent regulations, Law no. 418 of 1997 introduces special protection groups (CONGRESO DE LA REPÚBLICA DE COLOMBIA, 1997, see article 81), namely: (i) the political leaders – or activists – of the majority and, especially, of the opposition; (ii) peasant, civic and community organizations, unions, and ethnic and social groups; (iii) human rights organizations; and (iv) witnesses⁴⁵ in cases of human rights violations and IHL violations (CONGRESO DE LA REPÚBLICA DE COLOMBIA, 1997)⁴⁶.

Although established in 1997, the Protection Program was not regulated until 2010 (CONGRESO DE LA REPÚBLICA DE COLOMBIA, 2010a) and was only structured in detail with the issuance of Decree no. 4,912 (2011a), which established the *Prevention and Protection Program for people, groups and communities in situations of extraordinary or extreme risk* (PPP)⁴⁷, thus obligating the State to adopt the preventive and protective measures necessary to prevent attacks against persons, groups or communities at risk due to their political, public, social or humanitarian activities or functions. Only after this the Decree no. 1,225 (2012) altered the PPP, allowing preventive measures to be taken in case of risk to life, freedom, integrity and security. Thus, while in Decree no. 4,912 established measures to be adopted by municipalities or departments, Decree no. 1,225 imposed this obligation to adopt protective measures to “other state entities at the national and regional level⁴⁸.” In fact, the PPP allowed

45 They are considered witnesses, regardless of whether the administrative, disciplinary or criminal proceedings have been formally initiated.

46 Law no. 418 of 1997 created a “Specific Protocol”. This protocol introduces a gender approach and implements the National System of Human Rights and International Humanitarian Law, supported by the Ministry of the Interior, Resolution no. 0805 (2012) and Decree no. 4,100 (2011b).

47 The extraordinary risk, according to Decree no. 4.912 of 2011, must be specific, individualized and concrete or based on actions and facts that are particular, manifest, current, significant or which might cause damage to protected legal assets, as well as being serious, clear and discernible, exceptional and disproportionate (MINISTERIO DEL INTERIOR DE LA REPÚBLICA DE COLOMBIA, 2011a, see article 3, item 16). In turn, the extreme risk must be serious and imminent and also meet the above characteristics (see item 17, art. 3).

48 Another modification introduced was that the children and relatives of former presidents and former vice presidents of the Republic, ambassadors, foreign consuls accredited in Colombia and religious authorities were excluded from the group of people in situations of extraordinary or extreme risk

the creation of the National Protection Unit (UNP), thus promoting the protection of the integrity of people at extreme or extraordinary risk (DEPARTAMENTO ADMINISTRATIVO DE LA FUNCIÓN PÚBLICA DE LA REPÚBLICA DE COLOMBIA, 2011), with respect to certain obligations⁴⁹ and following a specific procedure⁵⁰.

1.3.1.2 The early warning system (SAP) as a means of fighting crimes against defenders

The second measure adopted was the SAP, which has a constitutional basis: the Public Defender's Office must provide means for defending the environment (CORTE CONSTITUCIONAL COLOMBIANA, 2016b)⁵¹. At SAP, the Public Defender's Office was only in charge of identifying risk situations involving human rights; it subsequently issued Resolution no. 250 of 2003, establishing SAP as a preventive measure; and the monitoring of the risks affecting defenders was systematized at the regional and national levels. Initially, the SAP operation required the Public Defender to issue early warnings, receiving some criticism⁵². This situation would change later with Decree no. 2,780 (2010), which transferred the issuance of warnings to the Interinstitutional Early Warning Commission (CIAT). The Ministry of the Interior thus assumes the leadership of CIAT

protected by the PPP. It was thus established that the protection of public servants would be the responsibility of the National Police and other Special Administrative Units (PRESIDENCIA DE LA REPÚBLICA DE COLOMBIA, 2012). These public servants do not include those charged with designing, coordinating or executing the National Government's peace and human rights policy and the employees of the Attorney General's Office and of the National Public Prosecutor Office, who have a specific regulatory framework for their own protection.

49 In this regard, see art. 28 of Decree no. 4,912 of 2011, which establishes the Responsibilities of the National Protection Units.

50 The procedure is as follows: (i) the affected person sends a communication to the authorities or requests protection directly from UNP; (ii) the technical staff in charge of collecting and analyzing information – CTRAI – visits the place where the risk situation is reported and initiates the investigation of the case; (iii) after the investigation, CTRAI sends the information to the Preliminary Assessment Group (GVP) for the analysis of the case and related risks; and, finally, (iv) once the case has been assessed by the GVP, it is presented to the Risk Assessment and Measure Recommendation Committee – CERREM – which determines definitively the level of risk and whether protective measures should be taken, or whether to reassess the request.

51 Nevertheless, the Public Defender's Office participates in the National Environment Council, according to art. 13 of SINA.

52 The transfer of duties proposed by CIAT caused the alerts to be considered as simple preventive measures by local authorities, with the Public Defender's Office (2018) warning that only "[...] 5 governors and 16 mayors provided information about the actions [that they had carried out]," and that "[...] some authorities have merely indicated that, although there were no cases of human rights violations against human rights leaders and defenders in the territories under their jurisdiction [...] they would not take any preventive action".

and restricts the Ombudsman's Office to the issuance of risk reports⁵³. In addition, regulations such as Decree no. 250 (2005), the Justice and Peace Law, Law no. 975 (2005) and Law no. 1,106 (2006) – extended by Law no. 1,421 (2010b) – obligated regional authorities to respond to early warnings and develop prevention plans to prevent widespread violations of rights. However, the Peace Agreement's implementation recently brought about the issuance of Decree no. 2,124 (2017c)⁵⁴, which again granted the issuance of early warnings to the Public Defender's Office⁵⁵, creating, in addition, an Interinstitutional Commission for the Rapid Response to Early Warnings (CIPRAT)⁵⁶, criticized for its lack of effectiveness⁵⁷. Despite the readjustments – made through Decree no. 2,124 – and the fact that the new SAP will have a rapid response and reaction system, violence against social leaders persists; regrettably, protection and early warning measures are not being properly implemented.

53 Note that this change hindered the implementation of SAP prevention measures and the issuance of warnings. The Public Defender's Office warned (DEFENSORIA DEL PUEBLO DE COLOMBIA, 2017) that defenders were at risk in 277 municipalities, since their situation's status – according to Early Warning No. 26-18 – “was never elevated to the category of early warning by the Minister of Interior”.

54 The changes introduced by Decree no. 2,124 regarding the country's leaders or defenders were: (i) the SAP must identify risks and threats to life, integrity, freedom and personal security, with a gender, territorial and ethnic approach (see art. 6, Presidency of the Republic of Colombia, 2017); (ii) it is the duty of the government and authorities to ensure timely preventive measures. Warnings identified as imminent must be responded within 48 hours (see art. 15, Presidency of the Republic of Colombia, 2017); (iii) the rapid response and reaction component must “articulate interinstitutionally with national entities and regional authorities” (see art. 8) to implement protection measures in the face of risk warnings.

55 The issuance of Decree no. 2,124 (2017c) aimed to close the response gap regarding the vulnerability of and threats to social organizations and political movements, “especially those that declare themselves in the opposition, resulting from peace processes, as well as to members of organizations that have signed peace agreements” (see art. 1). Since Decree no. 2,124 came into force, the Public Defender's Office has officially issued 20 early warnings: 1 in 2017 and 19 in 2018.

56 To prevent human rights violations by criminal organizations, two prevention components were identified: “[...] one of temporary warnings in the Public Defender's Office... and another of rapid response and reaction in the National Government, with the participation of regional entities, coordinated by the Ministry of the Interior” (see art. 2, Presidency of the Republic of Colombia, 2017).

57 However, this information is questionable, since it suggests that the effectiveness of the protection was not hindered by Decree no. 2,124 (CORTE SUPREMA DE JUSTICIA, 2018). Between January and November 2018, 226 defenders were murdered (COORDINACIÓN SOCIAL Y POLÍTICA MARCHA PATRIÓTICA; CUMBRE AGRARIA, CAMPESINA.; INSTITUTO DE ESTUDIOS SOBRE PAZ Y DESARROLLO – INDEPAZ, 2018). In fact, according to the organizations *Social and Political Coordination of the Patriotic March, the Agrarian, Peasant, Ethnic and Popular Summit* (CACEP) and INDEPAZ, the disaggregated figures show that 105 victims were peasant, environmentalist and community leaders; 44 were indigenous leaders; and 40 people were enrolled in the National Sustainability Program for Illicit Use Crops. However, regionally, these organizations' figures show that the deaths were concentrated in 27 departments and, in them, in 112 municipalities, with 80.53% of the incidents occurring in 9 departments, namely Antioquia (33), Caquetá (11), Cauca (48), Córdoba (11), Meta (11), Nariño (13), Norte de Santander (18), Putumayo (18) and Valle del Cauca (19).

1.3.2 Elements of the international normative framework relevant to the protection of environmental defenders

On the other hand, the second group of rules provides more concrete elements. These regulations were created following international pressure. Decree no. 660, in addition to establishing the *Comprehensive Security and Protection Program for Communities and Organizations in the Territories*, characterized several profiles of “social leaders”:

- Individuals of varying gender and sex.
- Groups or corporations, regardless of membership in a registered organization.
- Human rights defenders and agents of change who (a) preserve democracy; (b) guarantee freedom, pluralism and participation; (c) uphold good governance and the rule of law; (d) achieve their ends using peaceful methods; and (e) act without territorial limitations, at national and international levels.

The expression “social leader” – as a category, thanks to the provisions of Law no. 2,137 (2018b) – includes members of civil society organizations, journalists – national and international media, photographers, bloggers and sources – and political activists dedicated to upholding freedom of expression and assembly, as well as environmental activists. Finally, including people who strive to make a healthy and ecologically balanced environment for all is the first step for building a definition of environmental defender. Colombia, in some ways, is aligned with some international instruments.

Therefore, environmental defenders are individuals and groups or corporations whose objective is to defend a healthy and balanced environment and the sustainable use of its resources (CORTE IDH, 2017a). They have the right to receive protection by States, institutional actors and society in general, as well as by economic actors. This support and protection should allow them to achieve their goals in a security environment free from threats or restrictions on their rights and freedoms⁵⁸. Adopting this perspective of the work of environmental defenders, the same Risk Report no. 010 of 2017 of the Public Defender’s Office had already established that social leaders, also called “community leaders,” fall into the category of human

58 It is worth remembering an event. At the Escazú Agreement’s 9th meeting, the public wanted to pay tribute to Berta Cáceres (GLOBAL WITNESS, 2016), an environmental defender murdered in March 2016. Flowers and a portrait of the leader were brought, but representatives from Colombia, Mexico and other countries stated that it was not allowed and did not even permit a minute of silence. This was the same meeting in which the definition of Environmental Defender almost disappears from the agreement.

rights defenders recognized by the Universal Declaration of Human Rights (ONU, 2019; UN, 1999)⁵⁹.

By insisting on the aspect of their “work,” the primary criterion of a definition becomes linked to the activity carried out, which may even take precedence or be on an equal footing with the professional activity (DEFENSORÍA DEL PUEBLO, 2017, p. 6)⁶⁰. Indeed, being environment defenders in Colombia does not require titles or contracts; their characterization is supported by their activity, by their dedication of vital force to the proper care of mother earth, or our “common house” (FRANCISCO I, 2015)⁶¹. Their work strengthens democracy, according to the Escazú Agreement (ECLAL; CCJ ACADEMY OF LAW, 2018). However, as long as the Iván Duque’s government does not sign and ratify Escazú’s proposals, the definition of environmental defender will remain incomplete, and it is for this reason that it is necessary to look for alternatives, drawn from legal arguments, as proposed below.

2 ABDUCTIVE REASONING APPLIED TO CASES OF ACCESS TO JUSTICE

To analyze the possibilities offered by abduction, we will examine some of its characteristics (2.1) and apply them to the inter-American system (2.2).

⁵⁹ The UN agrees that the “Human Rights Defender” convention is the most successful, as footnote no. 1 of one of the UN’s promotional documents shows: “The term “human rights defender” has been used increasingly since the adoption of the Declaration on human rights defenders in 1998. Until then, terms such as human rights ‘activist,’ ‘professional,’ ‘worker’ or ‘monitor’ had been most common. The term ‘human rights defender’ is seen as a more relevant and useful term”. (ONU, 2019).

⁶⁰ “Human rights defenders are women and men who promote or strive in any way for the realization of human rights and fundamental freedoms recognized at the national or international level. The criterion for identifying who should be considered a human rights defender is the activity carried out by the person and not other factors, such as receiving remuneration for his work or belonging or not to a civil organization. The concept is also applicable to legal operators who act as defenders of access to justice for thousands of victims of violations of their rights”.

⁶¹ It can be said that the pre-modern position of the Catholic Church now coincides with the vanguard ecological constitutionalism. The slogan is simple: take care of the planet because it is the place where we all live and, for that, it is necessary to avoid at all costs altering the balance that the laws of ecology dictate. Recently, in Brazil, the National Conference of Bishops decided to implement transformative actions to make this possible: “In Brazil and in the world, several initiatives highlight this moment of celebration for the document that invites us, among other instigations, to reflect on the future of the planet. The bishop of Brejo (MA) and president of the Episcopal Pastoral Commission for Transformative Social Action of the National Conference of Bishops of Brazil (CNBB), Dom José Valdeci Santos Mendes, says that celebrating the anniversary of *Laudato Si* is ‘exactly assuming this commitment with environmental issues, with an integral ecological approach where traditional communities are taken into account, with environmental balance. This demands of us always more of this zeal for our common home, for God’s creation” (IGREJA CATÓLICA APOSTÓLICA ROMANA, 2019).

2.1 Particularities of abductive reasoning

Abduction is a form of logical inference distinct from deduction (JONGSMA, 2019, p. 42–51) and commonly used in law (Table 1); legal propositions follow the simplest form of syllogism: a decision is reached based on known rules and facts (Table 2). In contrast, abduction starts from the decision and the rule to reach the situation (HOFFMANN, 2019, p. 1402-1403), as if it there were a reason to suspect so (HOFFMANN, 1999), inverting the basic understanding of legal operators.

Table 1 Types of reasoning

Reasoning	Premise	Example
Deduction	<i>Rule</i>	All environmental defenders are in grave risk of dying in Colombia
	<i>Case</i>	“X” is an environmental defender
	<i>Result</i>	“X” is in grave risk of dying in Colombia
Induction	<i>Case</i>	“X” is an environmental defender
	<i>Result</i>	“X” is in grave risk of dying in Colombia
	<i>Rule</i>	All environmental defenders are in grave risk of dying in Colombia
Abduction or hypothesis	<i>Result</i>	“X” is in grave risk of dying in Colombia
	<i>Rule</i>	All environmental defenders are in grave risk of dying in Colombia
	<i>Case</i>	“X” is an environmental defender

Source: The authors

Initially, this obviates the need for any theory in particular, although if the expectation is identifying one⁶², it is necessary to find an explanation for the facts. In abduction, the hypothesis is the starting point; it is a type of reasoning in which the minor premise is reached from the major premise and the conclusion⁶³ (Table 3).

Inferences cannot be confused with one another (Table 1). On the

62 “Abduction, thus, appears as the path from facts towards ideas and theories, while induction is the path from ideas and theories towards facts in order to obtain a basis for statistical assessment of the ideas’ and theories’ probabilities. Abduction seeks a theory. Induction seeks for facts. In abduction the consideration of the facts suggests the hypothesis.” (HOFFMANN, 1999, p. 272).

63 In this sense, the following passage can be quoted literally: “In his manuscript *Lessons from the History of Science* (CP 1.43-125, c.1896), with notes for an unfinished project for a *History of Science*, written probably around 1890, he adopted the new term “Retroduction” to designate what he previously called a hypothesis, now corresponding to the Aristotelian interpretation that Peirce was giving to abduction: “Retroduction is the provisional adoption of a hypothesis, because every possible consequence of it is capable of experimental verification, so that the persevering application of the same method may be expected to reveal its disagreement with facts if it does so disagree” (CP 1.68, c. 1896) (SANTAELLA, 2011).

one hand, abduction differs from induction, since the latter results from the regular observation of a phenomenon; but abduction results from the connection of the consequent observed events with their antecedents. Abduction should also not be confused with deduction, which has the capability of predicting, applying and confirming, while abduction has different capabilities, such as going back, discovering and explaining (ARIAS GONZÁLEZ, 2004).

Table 2 Legal syllogism of deductive reasoning

Syllogism	Equivalence	Legal syllogism
Major premise (P +)	to	Legal norm
Minor premise (P -)	to	Fact, act or omission
Conclusion (C)	to	Judicial sentence

Source: The authors

Peirce's concept of abduction presupposes the capacity for abstraction, where the apprehension of a phenomenon is not a totally rational act. Intuition complements reason, as a hypothesis is a possible answer to a question; deduction and induction are forms of logical inference, structured as intellectual games based on known data, but abduction *has an instinctive component* (HINTIKKA, 1998). Peirce goes beyond the classical understanding of the types of reasoning, postulating a tool that may be adopted by legal operators who cannot find answers to certain challenges, for example, the systematic extermination of social leaders. The intuition, early knowledge and epistemological approach of legal experts, i.e. their worldview, intervene here.

2.2 Abduction in cases of access to justice by environmental defenders

As stated earlier, the problem of guaranteeing access to justice for environmental defenders in Colombia is marked by imprecise definitions. This situation prevents the issue of social leaders' security from being properly addressed, within the context of other post-agreement issues such as deforestation (IDEAM, 2018)⁶⁴. Using the approach of abductive reasoning might offer some solutions.

⁶⁴ IDEAM (*Hydrology, Meteorology and Environmental Studies Institute*) issues alerts to provide information on deforestation through its "Forest and Carbon Monitoring System" (2019a) with bulletins as mentioned above (2019b).

2.2.1 Abduction and access to justice

This form of reasoning allows defenders to guarantee their right of access to justice, thanks to the specific configuration of the problem. On the one hand, institutional factors – that is, imprecise legislation and regulation (see above) – and, on the other, social factors – such as the biased perception of social protest in Colombia (BENAVIDES MEDINA *et al.*, 2017)⁶⁵ – distort how defenders and the work they do are perceived; environmental defenders cannot access the justice to which they are entitled and their rights get distorted because their guarantees are not limited to those of any other person who may be a victim of violence. For this reason, legal operators must find concepts that allow them to see the legal system more than the rule. Such a task can be achieved through abductive reasoning.

2.2.2 Abduction applied to the case of environmental defenders

Nonetheless, in the specific case of environmental defenders, the hypothesis would be based on art. 9 of the AE (see section 2 above), but applied to the case of attacks on the integrity of these defenders, as defined by the international community (FORST, 2018). Step by step (Table 3), abduction allows us to establish: first, the hypothesis – the expected result – which would be their protection as enshrined by the community of Latin America and the Caribbean nations in Escazú; second, the rule would be derived from the legal norms that make up the domestic legal framework, which were denounced here as insufficient; and third, the case would be any situation of violation of the rights of environmental defenders in Colombia; the data are unknown, but intuition can be applied for the purpose of abductive reasoning (PEIRCE, 1878).

In the example, the second premise of the inference is a legal norm, but that is insufficient per se; it cannot be perceived in the light of inductive or deductive reasoning, only under a more complex perspective. This statement is based on abduction as an epistemological proposal. Thus, to balance the *weak premise of the reasoning*, the legal operator must resort to EA's art. 9 and to other theories or practices, for example, the

⁶⁵ This also happens in Brazil, even with the laws already enacted, because they do not get the social objective of protests into focus (PODER EXECUTIVO DA REPUBLICA DO BRASIL, 2018), concentrating instead in investigating people for acts of terrorism or similar (“Provides for the compliance with sanctions imposed by resolutions of the United Nations Security Council, including the unavailability of assets of natural and legal persons and entities, and the national designation of persons investigated or accused of terrorism, its financing or related acts”).

Inter-American standard of protection for defenders, a way to guarantee, in our own way, access to justice for environmental defenders.

2.3 Epistemological proposal and abduction

Because it is an epistemological proposal that affects directly the perception of the world, every legal operator should adopt it. Thus proposed, abduction differs only from the formal parameters of Peirce's proposal, although it does not deviate from its teleological sense.

2.3.1 Reasons for adopting abduction

In light of all the above considerations, any situation that threatens the life and integrity of those who protect the territory and nature must be unequivocally perceived as a case of violence against an environmental defender. For example, before becoming visible – in the media and to official channels of State agencies – the systematic elimination of social leaders was usually confused with cases of “crimes of passion”, as was denounced by Channel 1 (2017). This was true during the government of President Santos and is still true today: recent Global Witness' reports (2019) and others national-level reports (see item 2 above) focus their concerns not only on the systematic nature of the attacks (VERDAD ABIERTA, 2018), but also on their confusion with acts of revenge or jealousy, as mentioned above, when in reality they were crimes against defenders. In addition, the IACHR (2015) demanded the prosecution of these cases, but their recommendations are hardly applicable if there is no will on the part of legal operators and the highest government authorities (CIDH, 2017a, para. 170).

In this sense, environmental defenders' right of access to justice becomes clear with this approach to establishing a specific definition. Although a clear and precise legal definition is still lacking, there are currently specific elements taken from EA's art. 9 that can be treated and reinforced with abductive reasoning, for example, the concept of constitutional block that integrates elements external into the Colombian legal framework, in accordance with art. 93 of Colombia's Political Constitution.

2.3.2 Abduction and the Inter-American standard of protection for human rights defenders

Abduction facilitates the application of the Inter-American standard, according to the syllogism's propositions (Table 1): (i) the result (major premise) is the vulnerability of environmental defenders when they cannot access justice because of the lack of recognition of their condition, but the sentence imposed upon their attackers must be guided by the recognition of a particular situation of vulnerability; (ii) the rule (minor premise) would be the domestic legal norm that indirectly protects environmental defenders, the Inter-American standard and EA's art. 9, even though the latter is not yet part of the Colombian legal system (QUINCHE RAMÍREZ, 2016); and, finally, (iii) the case (conclusion) is what really gives cause for concern, because it would represent an undifferentiated situation, *prima facie*, with respect to any other situation of violence, provided that the status of environmental defender is not expressly recognized.

Table 3 Legal syllogism of abductive reasoning

Syllogism	Equivalence	Legal syllogism
Conclusion (P+)	to	Judicial sentence
Minor premise (P-)	to	Legal norm
Major premise (C)	to	Fact, act or omission

Source: The authors.

The indecisiveness of recent governments makes it difficult to guarantee access to justice for defenders. Hence the application of abductive reasoning to build a *hypothesis* based on the Inter-American norm of the “obligation to guarantee,” considering that the number of murdered leaders in Colombia increases every day (PROGRAM SOMOS DEFENSORES, 2019)⁶⁶ and that this is our first premise, as the Early Warnings are not responded with *due diligence*⁶⁷. Therefore, in view of this

⁶⁶ Since 2016, 777 leaders have been murdered: 155 in 2019, as of September 8; 282 in 2018; 208 in 2017; and 132 in 2016. Publimetro Colombia (2020) states that 13 leaders were already assassinated in 2020.

⁶⁷ That is the case of Early Warning no. 054-19 (not disclosed to the public), dated December 18, 2019. This indicates a risky situation that involves danger for many groups in Colombia's northern department of Córdoba (Municipalities of Tierralta, Monte Líbano, Puerto Libertador and San José de Uré). There is very little that the national government can do, however, because government action is mostly absent. The same is true of the municipality of Bojayá, in the department of Chocó: after the May 2, 2002 massacre, the population again fears the presence of new illegal armed groups. The government maintained a governmental council in situ to protect threatened leaders, but there is also some distrust due to an already traditional institutional weakness, which leads to the perception of a

reality, the formulation of a hypothesis for a certain result must start, but not immediately, with the applicable norm; as Pierce suggests in his abductive reasoning, these are, respectively, the first two premises that precede any conclusion. And this syllogism leads to the *intuition* that violence against a defender cannot be understood as an ordinary fact or situation (Tables 1 and 3).

As for the second premise, the EA has already been signed by the government, but, unfortunately, there is no immediate guarantee that the process will result in the enactment of a national law. Following this line of thought, access to justice for environmental defenders would be supported by sound guidelines for the interpretation of existing positive regulation and not by a specific rule. Thus, abductive inference facilitates risk management, according to the 2011 and 2017 IACHR reports on the protection of defenders and links the Inter-American norm to EA's art. 9, whose impreciseness allows considerable flexibility for acting preventively. If the IACHR urges "States to act with due diligence to protect" defenders (2017a, para. 344), it is precisely that diligence that should lead every legal operator to formulate the case – that is, the conclusion of abductive reasoning – as a situation in which the victim's personal situation is always assessed, understanding this victim as an environmental defender.

Contemporary societies should demand that their authorities act taking into account the latent risks in all situations (Beck, 1998). And these risks are what determine the first premise of abductive reasoning. Because of the increase in the number of leaders assassinated in Colombia, every legal operator should aim to reduce risks. Thus, based on a particular epistemology of the situation of environmental defenders, abduction enables legal operators to take legal norms and the inter-American standard as a minor premise, despite the fact that Colombian legal system does not provide, *mutatis mutandis*, a positive definition of the persons to be protected.

First, the EA was not translated into a law of the Republic of Colombia. Second, the Inter-American system *must be applied by the authorities of the States parties to the American Convention*, but this requires intermediaries and adaptations to the particular context of environmental issues. It is not a matter of distrusting judges or legislators, but the above shows how far the application of EA's art. 9 is to the immediate facts of reality, which are,

risk of non-conformity with due diligence obligations. For this reason, it is necessary to be attentive to the measures adopted and to Decree no. 2,354, dated December 26 (2019), whose objective is to modify the process of prior consultation as of January 1, 2020, giving administrative and financial autonomy to the department in charge of consultation and naming it "Directorate of the National Early Consultation Authority".

precisely, the conclusion of the syllogism (Table 3). And third, considering all the above, it is necessary to clarify that the third proposition is a variable: it should be clarified in accordance to the structure of abduction.

Abduction is also an epistemological proposal, it is thus possible to formulate a hypothesis of compatibility between the Inter-American standard and the EA based on facts determined with much more information than the immediate reality provides and on the most basic legal syllogism in contexts of systematic violence against environmental defenders. Thus, decision-making on the basis of this operational philosophical principle would guarantee access to justice for environmental defenders.

CONCLUSION

The analysis of environmental defenders' access to justice is affected by the ambiguous attitude of the current government towards the Escazú Agreement: in 2019, it officially declared that it did not intend to sign it, only to be compelled to do so after the "national strike" on November 21 because of the pressure of civil society, which was aware of the systematic violence against female leaders and other social leaders criminalized and rendered invisible, who lacked a legal definition of their status. However, EA's art. 9 establishes a specific definition, although not yet transposed to the Colombian legal system, and this difficulty can be resolved with abduction, a form of inference whose premises are expressed as follows: the conclusion (P+) is the Judicial Sentence; the minor premise (P-) is the Legal Norm; and the major premise (C) is the fact, act or omission.

The absence of a specific definition resulted in (i) Judicial Sentences (major premise: P+) (Table 3) that violate human rights defenders' right of access to justice in environmental matters. However, there are well known (ii) *legal norms* (minor premise: P-) (Table 3) and (iii) facts (conclusion: C) (Table 3), which form the context of new acts of violence neglected by President Santos' governments; he managed to sign a Peace Agreement, but did not prepared the country to face this challenge.

Thus, environmental defenders are (i) individuals (environmental activists, journalists, photographers, informants and even bloggers), (ii) groups (iii) and institutions, (iv) professionals (v) or not, who (vi) adopt peaceful means (vii) to contribute to the prevention of human rights violations of peoples and individuals that (viii) protect (ix) the environment (x) and the territory. They are persons who strive to make the environment in

which everyone lives healthy and ecologically balanced, who must have recognized by the State rights such as to: (i) a safe environment, without threats, restrictions and insecurity; (ii) effective and appropriate measures to recognize, protect and promote these rights; and (iii) appropriate, effective and timely measures to prevent, investigate and punish attacks, threats or intimidation. This definition is built on national and international standards.

One might think that Colombia does not guarantee access to justice for environmental defenders, but abduction could allow reasoning in line with Inter-American standards for the protection of human rights defenders and with other international standards and instruments, thus providing a final definition. In the absence of the intuition that the abduction allows, crimes against environmental defenders cannot be distinguished from other situations of violence. For this reason, legal operators' reasoning must be reinforced by an epistemological proposal that allows them to understand that the decision they make does not negate the actual context and helps to guarantee an effective protection of the human rights of defenders of the environment and the territory.

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