
**QUESTIONNAIRE FOR STATES AND CIVIL SOCIETY TO ASSIST IN THE PREPARATION OF A REPORT
ON THE CRIMINALIZATION OF HUMAN RIGHTS DEFENDERS THROUGH THE MISUSE OF CRIMINAL
LAW**

- 1. Has the misuse of criminal law as a means to criminalize human rights defenders for the work they do been identified as a problem in the State? If so, indicate:**
 - a) In what ways do you think such criminalization is carried out?**
 - b) In what contexts does it reportedly occur?**
 - c) Who is involved?**
 - d) What would be the main causes or factors prompting it?**

In Guatemala, we have noted a growing criminalization of human rights defenders (HRDs). The repression takes various forms including illegalization of peaceful protest, defamation campaigns in the national mainstream media, as well as through the misuse of criminal law.

In this context, we understand the misuse of criminal law as the frequent groundless accusations against HRDs, the falsification, manipulation or omissions of evidence, as well as the deficient investigations. Additionally, we include the delays in court hearings which aim to discourage and delay HRDs work and weaken their access to the justice.¹

Due to the nature of our work, we identified conflict over resources as a main source of dispute; this includes mining and energy distribution (such as electricity):

-In the case of mining, Guatemala is currently experiencing a new peak; The Guatemalan Association of Mine, Quarry and Processing Companies estimates that the industry will invest 2.31 billion dollars in the period of 2010-2016, will pay 280 million dollars in taxes and royalties and will generate some 16,000 jobs.²

-Similarly, the privatization of energy supplies significantly affects rural and indigenous communities who feel increasingly marginalized. The rush for a neo-liberal development model appears to be at their expense. Additionally, concerns are raised over the lack of prior consultation for an extraction project and which constitutes a violation of indigenous rights.

Consequently, both state and non-state actors are involved in the criminalization of HRDs and activists.

Also, we believe it is important to note the influence of the legacy of Guatemala's civil war and subsequent genocide: Guatemala appears unable to make accountable those responsible of crimes against humanity during this period. This is demonstrated through the overturning of Rios Montt's sentencing in 2013.

¹ <https://comunitariapress.wordpress.com/category/yolanda-oqueli/>

² <http://micla.ca/countries/guatemala/>

We believe this to be critical, as there is an ambiguous relationship between the extractive industry and the history of conflict in Guatemala:

- The current Home Secretary (Ministro de Gobernacion), Mauricio Lopez Bonilla is a former colonel who actively participated in the crimes against humanity perpetrated against the Ixil people during the civil war
- The responsible for operations at EXMINGUA (Guatemalan subsidiary of US firm Kappes, Cassidy and Associates), Pablo Silas Orozco is also a veteran. In recent conflicts over the extractive industry, he is responsible for threats and intimidations of journalists³

These elements are crucial to consider as they reveal the lack of transparency and impartiality in these disputes. It also highlights why many HRDs and activists claim that the growing of extractive industry is a continuation of the civil conflict in Guatemala, serving to perpetuate the marginalization of these communities.

2. Are you aware of any situations in which agents of the State have levelled groundless accusations of criminal activity against human rights defenders in order to discourage, obstruct, and/or limit their work? What crimes have human rights defenders allegedly been unjustly accused of committing and in what contexts has criminalization reportedly occurred? Where possible, provide examples.

We have noted many cases in which State agents have levelled groundless accusation of criminal activity against HRDs.

These accusations are unsurprising in a context where State agents publicly announce their disapproval of non-governmental organizations and HRDs: the Home Secretary Bonilla who accused human rights NGOs and activists of “blackmail” and “extortion” during a 2013 meeting with the leaders of the Chamber of Industry⁴. It is therefore explicit that the overall environment is not welcoming to HRDs, as it gives the green light to active criminalization.

A recent example of groundless accusations by State officials occurred in September 2014: the First judge of the Tribunal on Narco-Activity and Crimes against the Environment of Chiquimula accused Woman human rights defender (WHRD) Norma Lila Sut Sancir, of “assault” and “inciting public disorder” after having participated in peaceful anti-mining protests⁵.

Norma is a journalist who works on issues surrounding human rights, the environment and education. She works as the Coordinadora Central Campesina Ch’orti’ “Nuevo Día” (New Day’ Chortí Campesino Central Coordinator) and has also for the Prensa Comunitaria (Community Press).

³ <http://comunitariapress.wordpress.com/2013/10/20/sobre-militares-mineras-y-el-derecho-a-comunicar-las-lecciones-del-caso-silas-orozco/> and <https://ghrcusa.wordpress.com/tag/exmingua/>

⁴ <http://www.tvwfdc.com/2013/11/26/el-gobierno-guatemalteco-acusa-a-activistas-humanitarios-de-chantaje-y-extorsion/>

⁵ <http://www.frontlinedefenders.org/node/27316>

She was arrested without warrant following these accusations, and subsequently released after three days⁶. We strongly believe the accusations set against her were intended at delegitimizing and obstructing her work.

3. Have there been situations in which private individuals have leveled groundless accusations of criminal activity against human rights defenders in order to discourage, obstruct, and/or limit their work? What crimes have human rights defenders allegedly been unjustly accused of committing and in what contexts has this reportedly occurred? Where possible, provide examples.

As previously mentioned, we identified conflict over resources as main source of dispute, involving foreign mining companies and their subsidiaries, as well energy distribution companies. Therefore it is frequent that non-state actors actively contribute to the criminalization of HRDs.

In May 2012, three workers from EXMINGUA mining group pressed charges against Yolanda Oqueli, an emblematic WHRD known for her leadership at La Puya, a community movement opposing mining project El Tambor⁷. She was accused of “coactions”, “threat” and “illegal imprisonment”.

Similarly, electricity distribution company ENERGUATE, accused WHRD, Blanca Julia Mejia Atjum, Vice-President of rural organisation CODECA, of being a threat to the State’s welfare⁸. She and two of her colleagues were thus arrested without warrant.

Neither of these charges was backed with any form of verification. This leads us to believe that the accusations were groundless and aimed at obstructing the WHRDs’ work.

4. What effects (psychological, physical, family-related, social, and economic) do you believe criminalization has on human rights defenders? Where possible, provide examples.

The criminalization by both State and non-state actors affects HRDs at many levels: for their work, personnel well-being, security, physical and psychological health. The experiences of Yolanda Oqueli and other members of community-led resistance movement La Puya illustrate the pervasiveness of the impact of criminalization.

La Puya is mainly driven by rural or indigenous women. Ever since its establishment in 2012, they face many challenges due to deeply entrenched forms of discrimination. It is visible that criminalization of WHRDs is not simply a mean to discourage them from continuing their work, but also aims to perpetuate inequalities based on gender, class and ethnicity.

⁶ <http://www.awid.org/Get-Involved/Urgent-Actions3/Guatemala-Temporary-Detention-and-Subsequent-Release-of-Human-Rights-Defenders-following-Peaceful-Demonstration-against-Mining-Activities>

⁷ <http://www.ghrc-usa.org/our-work/current-cases/san-jose-del-golfo/>

⁸ <http://www.frontlinedefenders.org/node/26505>

Discrimination, combined with the failure of the State to protect them from different forms of violation, generates an overall feeling of isolation and vulnerability. The psychological harm caused by the criminalization of WHRDs is often ignored⁹. Nevertheless, it is critical to fully understand their experience and the obstacles they face in their work.

Very often, the women at La Puya are also parents. This adds considerable strain on their well-being as they find it impossible to provide their children with a safe environment. Some members have claimed being subject to depression and/or have considered taking their own lives because of the growing pressures against them and ongoing criminalization.

Yolanda Oquell's own experiences illustrate this point: in 2012, she survived a deadly attack when she was shot by two unknown men. Yolanda still suffers from the repercussion of this attempt, both physically and emotionally.

In November 2013, she was admitted into hospital due to stress-related illness; she claims she is afraid of future reprisals, and feels constantly exposed to risk. As a single mother of two, she is also concerned for their safety¹⁰.

In view of this, we believe it is critical to provide women defenders to enable them to continue their work, ensuring their own personal safety and that of their family. For this reason, we advocate for a broader understanding of protection which is inclusive of defenders' physical as well as psychological well-being.

- 5. Identify and list the types of criminal charges provided for under your laws that serve to protect, either expressly or implicitly, the honor or reputation of public servants, or public figures or private individuals who have voluntarily become involved in matters of public interest (for example: insult, contempt, libel, sedition, defamation, incitement, slander). Where applicable, indicate whether the criminal offenses that fall into this category have been used to prosecute human rights defenders for engaging in their work. Where applicable, indicate whether you are aware of any of these charges having been used to criminalize the freedom of expression of human rights defenders.**

Laws that serve to protect the honour or reputation of public servants, public figures or private individuals are enshrined in the Penal Code. These are mainly listed between articles 411-413 and make reference to "insult", "threat" or "calumny" against any figure of public authority. Sanctions generally involve detention to up to three years¹¹.

However, in theory the Political Constitution of Guatemala should take precedence over the Penal Code and is considered the overpowering law in the country. Enshrined in the Constitution is the article 35 which claims that publications containing complaints against public officials or employees for acts done in the exercise of their duties do not constitute a crime¹².

⁹ <http://www.awid.org/AWID-s-Publications/Women-Human-Rights-Defenders/Our-Right-to-Safety-Women-Human-Rights-Defenders-Holistic-Approach-to-Protection>

¹⁰ <http://redulam.org/mujer-de-junio-yolanda-oqueli/>

¹¹ <http://leydeguatemala.com/codigo-penal/atentado/3197/>

¹² <http://prensaregional.com.gt/over-blog.org/pages/articulo-35-constitucion-politica-y-ley-de-libre-emision-del-pensamiento-guatemala-2489892.html>

6. Identify and list the types of crimes provided for under your laws having to do with safeguarding “public order”, “peace,” or “national security” (for example: rebellion or blocking of roads, terrorism, sabotage, conspiracy, public disturbance, attacks against State security, sedition, insurrection, destabilization). Where applicable, indicate whether you are aware of any of these charges having been used to criminalize social protest by human rights defenders.

The Codigo Penal also contains laws to safeguard “public order”. These include:

- Article 257 on aggravated usurpation,
- Article 391 on terrorism which includes crimes such as damages on public infrastructure,
- Article 415 on public disorder
- Article 392-3 on public intimidation
- Article 396 on illicit reunions and association

Defenders are frequently accused of committing crimes that are established in these articles. Their participation in peaceful protests for example, is often manipulated and used against them under charges such as “inciting public order” or “terrorism”.

Conflict over GoldCorp’s Marlin mine in 2010 became symbolic for the repression of human rights defenders. Mayan community activist, Cristina Hernandez was charged with the destruction of private property because of her participation in a protest that led to the burning of mine vehicles. However, there was no evidence of her involvement in this act of vandalism¹³.

More recently, a Commissioner from the Home Secretary is pressing charges against Yolanda Oqueli and her guards (part of cautionary measures recommended by the Inter-American Court on Human Rights following an assassination attempt in June 2012) for blocking the way during a peaceful protest activity. According to the Home Secretary, this constituted a violation of article 26 of the Constitution on free mobility (libre locomocion).

However, Yolanda denies these charges and is worried they will be used against her to remove her private protection. These aim at hindering the WHRDs’ work but also at creating an unsafe environment in which they are increasingly at risk.

7. Identify and list, where applicable, any other types of criminal charges you are aware of that have been used to criminalize human rights defenders.

Other charges against HRDs include “illegal imprisonment”, “threat” and “injury”. Both accusations were made in May 2012 by three mine workers against Yolanda Oqueli, Jacinto Pineda Catalán, Fernando Castro Carrillo, Eusebio Muralles Díaz and Gregorio de Jesús Catalán Morales¹⁴.

¹³ <http://rabble.ca/news/2012/03/guatemala-women-defenders-defy-canadian-mines-and-plead-help>

¹⁴ http://www.ghrc-usa.org/Publications/El_Quetzal/Numero12con_nota.pdf

8. Are you aware of any requests for precautionary measures in criminal cases –such as pretrial detention or bond– whose aim is to discourage, obstruct, and/or limit the work of human rights defenders? Where possible, provide examples.

Pre-trial detention was used as a mean to limit Woman Defender Blanca Julia Mejia who was arrested in June 2014. She was arrested alongside three of her colleagues and charged with “coercion”, “sedition” and “attempts” against national security by ENERGUATE.

The arrest was made without warrant and the public prosecutor requested that Blanca to remain in custody until her audience on the 10 September 2014. This audience was delayed and she was finally released on the 29 September 2014.¹⁵

9. Are you aware of human rights defenders having been detained by state agents so as to restrict their personal liberty at crucial times in the causes they represent?

The arrest of Blanca Julia Mejia occurred at a crucial time in the cause she represents; she is the vice president of the rural organization CODECA and is known for her position against the privatisation and inflating rate of electricity, essentially affecting rural and indigenous communities.

Along with three other HRDs, she was arrested following the visit of the British Foreign Affairs Secretary. The politician arrived to Guatemala to support British business in the energy sector that, together, has invested over \$1billion in the Central American country. One of the most important ones is ENERGUATE, subsidiary of British company ACTIS Capital LLP¹⁶.

The link between the visit of the UK politician and Blanca’s arrest is clear: prior to their incarceration, the HRDs were kidnapped by unknown men who claimed they were acting to protect ENERGUATE’s interested. After being released by the PNC, they were immediately taken to the station where the company’s legal representative accused them of coercion and sedition. There was no investigation into the prior kidnapping¹⁷.

10. Identify and provide information regarding mechanisms available for investigating and punishing potential cases of abuse of power in which criminal law has been wrongfully used against human rights defenders

We identified two main mechanisms in Guatemala that are available for the investigation and punishment of potential cases of abuse of power against HRDs. The Human Rights framework is relevant in this case, as promoted in the Basic Principles of Justice for Victims of Crimes and Abuse of Power¹⁸.

¹⁵ <http://www.frontlinedefenders.org/node/26505>

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/307561/business2014FINAL.PDF

¹⁷ <http://www.frontlinedefenders.org/node/26505>

¹⁸ <http://www.ohchr.org/EN/ProfessionalInterest/Pages/VictimsOfCrimeAndAbuseOfPower.aspx>

Within the Public Secretary (Ministerio Publico) there is a Prosecution Unit for Crimes against Human Rights Defenders, judicial officers, journalists and trade unionists (Agreement of the Fiscalía General 37-2010). The role of this Unit is to investigate crimes and violations of human rights. According to article 8 of the agreement, this Unit should take precedence in the event that the perpetrator is a civil servant or employee. Article 9 stipulates that the investigation and punishment of the violations will be implemented in compliance with national laws, the Political Constitution, and International Human Rights¹⁹.

In addition, the Human Rights Prosecutor is commissioned by Congress to defend Human Rights established in the political constitution of Guatemala, the Universal Declaration of Human Rights and other Treaties and Conventions ratified by Guatemala.

His role is essentially to investigate and denounce administrative behaviours that are harmful to citizen's interests and all kind of accusations of human rights violations. Based on the article 23 of the Law of the Human Rights Commission of the Republic and of the Prosecutor of Human Rights (PDH), the PDH can initiate legal procedures against any person, civil servant, public or private employee or institution for any act that affect or violate human rights²⁰.

- 11. What has the State's response been when human rights defenders report having been criminalized through the opening of groundless criminal investigations or judicial actions against them for purposes of hindering their work? Specifically,**
- a) What authority could they appeal to?**
 - b) What procedure would be followed?**
 - c) What type of punishment could be imposed against state agents or individuals who wrongfully use criminal law to prevent the work of human rights defenders?**
 - d) Provide the corresponding legal instruments or basis.**
 - e) Where applicable, provide examples of punishments imposed.**

Defenders can appeal to the Constitutional Court regarding groundless criminal investigations or judicial actions against them.

A potential outlet for this process is the *Ley de Amparo and Exhibicion Personal, y de Constitucionalidad*²¹ (Law on Constitutional Protection and Action) which aims to protect individuals against threats of violations of their rights enshrined in the Constitution and to restore these rights if violation has occurred. Sanctions can include fines and permanent destitution of functions.

Currently a group of Mayan defenders in the district of Barillas are appealing to the Constitutional Court with the support of the Judiciary Commission of the Mayan Peoples' Counsel. This appeal is

¹⁹ http://www.mp.gob.gt/transparencia/wp-content/uploads/filebase/inciso1/Fiscal%20ADas_de_Secci%20B3n/Acuuerdo_37-2010_y_reformas/Acuuerdo_37-2010_Regl._OyF_Fiscal%20ADa_Secci%20B3n_DH_escan.pdf

²⁰ <http://www.pdh.org.gt/procurador/funciones.html>

²¹ <http://www.oj.gob.gt/es/queesoj/estructuraoj/unidadesadministrativas/centroanalisisdocumentacionjudicial/cds/CDs%20leyes/2006/pdfs/normativa/D001-86.pdf>

to revoke an arbitrary sentencing against them following a court case involving the company Hidro Santa Cruz²².

The procedures initiated on the 10 October 2014 with a Public Hearing and the Court is yet to make public their decision. The Defenders were unrightfully charged for kidnapping by the tribunal of Santa Eulalia.

Overall however, we are unaware of any other official response of the State when HRDs report having been criminalized through the opening of groundless criminal investigations against them.

12. Do administrative or other types of sanctions exist for public officials who use their offices to issue statements that stigmatize or hinder the work done by human rights defenders, or that increase the level of risk to which such individuals may be exposed by virtue of the work they do, for example, situations in which even though no legal judgments may have been issued against human rights defenders, they have nonetheless been publicly accused of having committed crimes? If so, provide the legal provisions that govern such sanctions.

The responsibility of Public officials to respect the Law, including the Penal code and the Constitution is established in the Probity and Accountability Act of Civil Servants and Public Employees (*Ley de Probidad y Responsabilidades de Funcionarios y Empleados Publicos*), Decree 89-2002²³.

Additionally, sanctions that are specific to public officials are established in the Codigo Penal articles 418-483. These include “abuse of authority” which sanctions one to three years prison to the civil servant or public official who used their functions to order or commit an arbitrary or illegal act (art. 418)²⁴.

Or article 423: Any public official or employee who issues statements or orders that are contrary to the provisions of the Constitutions will be punished with imprisonment of one to two years and a fine of two hundred thousand quetzals.

13. Provide examples of rulings issued by the State’s courts that have identified criminal statutes that have been used to limit efforts to defend and promote human rights. For example:

- a) Finding criminal charges that punish an activity in defence of human rights to be unconstitutional or a violation of the Convention;
- b) Finding criminal charges to be unconstitutional or a violation of the Convention that, because they are vague or ambiguous, may be used to punish activities to defend human rights.

²² <https://comunitariapress.wordpress.com/2014/10/10/barillas-defensores-del-agua-en-audiencia-de-vista-publica-en-la-corte-de-constitucionalidad/>

²³ <http://www.oj.gob.gt/es/queesoj/estructuraoj/unidadesadministrativas/centroanalisidocumentacionjudicial/cds/CDs%20Leyes/2003/Leyes%20en%20PDF/Otras%20Leyes/Decreto%2089-2002.pdf>

²⁴ <http://leydeguatemala.com/codigo-penal/abuso-de-autoridad/3199/>

c) Dismissing criminal cases due to lack of grounds that were originally brought for purposes of limiting the human rights defence work being done by the human rights defender being prosecuted or criminally investigated.

On the 2 May 2012, three miners from the company EXMINGUA accused 8 members of the resistance movement known as La Puya of “illegal detention” and of “injury by machete”. Among the accused was woman human rights defender Yolanda Oqueli.

The audience was delayed until May 2014. During this last audience the legal representative of the accused declared there was no personalised investigation of the accusations; for example in the case of the injury by machete, there were no facts establishing who performed the attack, the time and place this took place²⁵.

The outcome of this audience was that Yolanda Oqueli was to be released on the grounds that as a woman she was not capable to use a machete or to threaten anyone. However, the other members are still being prosecuted.

Although Yolanda Oqueli was released due to lack of grounds, the overall proceedings of the audience are more than questionable; the sexist commentaries and the continuation of the trial despite the lack of investigation, demonstrate that the State’s response towards the criminalization of HRDs is not a positive one²⁶.

14. Indicate good practices and/or public policies that have been implemented in the State to prevent the criminalization of human rights defenders through the misuse of criminal law. Where applicable, provide examples of individuals who have benefitted from a state measure to prevent the State’s punitive power from being used by authorities and third parties for purposes of criminalizing human rights defenders.

The creation of a Prosecution Unit on Crimes against Human Rights Defenders, Justice Officials, Journalists and Trade Unionists as part of the Prosecution Unit on Human Rights, according to the agreement 03-2003, from the 9 march 2005. The aim of this Unit was set to investigate, individualise and process various crimes against HRDs²⁷.

This Unit appears to be a useful tool to prevent the criminalization of HRDs. However, we are convinced a more thorough implementation is required to fully prevent the misuse of Criminal Law against HRDs and activists.

15. What measures do you believe should be implemented in order to eliminate the criminalization of human rights defenders?

Following the previous question, “protection” of human rights defenders should be re-defined making explicit reference to the misuse of criminal law.

²⁵ Information received through verbal exchange with Yolanda Oqueli

²⁶ <http://www.fidh.org/es/americas/guatemala/15474-guatemala-hostigamiento-judicial-y-arresto-domiciliario-de-los-sres>

²⁷ <http://www.oas.org/es/cidh/defensores/docs/pdf/defensores2011.pdf>

COPERDEH, the leading institution for the promotion of Human Rights in the Executive has identified to need to mediate between different organisms in the Executive and Judiciary organisms. Further support should be given to these initiatives to guarantee their implementation.

Additionally, we believe the criminalization of HRDs must not be understood as a stand-alone issue; many Guatemalan HRDs, including Yolanda Oquelí, lament the fact that Guatemala remains a military government, with a high presence of ex-military in position of State authority. It is therefore critical to implement measures to prevent the use of arbitrary force against HRDs and to ensure the transparency of court dealings.

16. Include any other relevant information in connection with the criminalization of human rights defenders.

According to Yolanda Oquelí and her accompanying lawyer Edgar Perez (Bufete de Derechos Humanos); there are several other lawsuits against her that are still unknown. They allege they have difficulties accessing any further information about these.

There is therefore a considerable lack of transparency, as Yolanda is not aware of the events listed on the Computerized System for the Monitoring of Cases for the Ministerio Publico (SICOMP). The uncertainty of this situation adds considerable pressure for Yolanda and other HRDs²⁸.

²⁸ Information received from La Unidad de Protección a Defensores y Defensoras de Derechos Humanos (UDEFEQUA) through private correspondence.