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Critical perspectives on the security and protection of human rights defenders

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Since the United Nations General Assembly's adoption of the Declaration on Human Rights Defenders in 1998, there has been considerable effort to recognise and protect the right of individuals, groups and communities to promote and protect their own rights and the rights of others. Over time, a multi-level, multi-actor international protection regime for the rights of human rights defenders has emerged, derived from the international human rights regime. Actors in this goal-driven regime adopt a human security approach, emphasising the importance of having a holistic, multi-dimensional understanding of 'security'. In this article, we note positive developments in state commitment to the protection of defenders, as well as the debates, tensions and contestation that continue to exist. We emphasise the need for critical appraisal of the construction, function and evolution of this protection regime as well as its multi-scalar social and political effects, both intended and unintended. We highlight three specific areas where critical scholarship is needed to understand the nature of this protection regime, discussing the contributions of authors in this special issue: the definition and use of the term 'human rights defender'; the effectiveness of protection mechanisms; and the complex relationship between repression, activism and risk. In conclusion, we identify key areas for further research related to human rights defenders, stressing the need for the development of theory and practice related to their 'risk', 'security' and 'protection'.

Keywords: human rights defenders; risk; security; protection; regime

The human rights defender protection regime

The United Nations (UN) General Assembly's adoption of the 1998 Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (commonly known as the Declaration on Human Rights Defenders)¹ marked a milestone in the development of a multi-level, multi-actor international protection regime for the rights of human rights defenders. This regime has had a long genesis; the declaration itself was a product of a 'slow and drawn-out drafting process' lasting over 15 years, marked by tension, disagreement and compromise.² Since its adoption however, there has been considerable effort to recognise and protect the right of individuals, groups and communities to promote and protect their own rights and the rights of others.

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What are the key features of the human rights defender protection regime? First, it derives its ‘principles, norms, rules, and decision-making procedures around which actor expectations converge’³ from the international human rights regime. The declaration itself did not create new rights, but ‘reaffirms rights that are instrumental to the defence of human rights’.⁴ Over time, a number of key principles have emerged in the operation of this regime. These include: the recognition of local actors as key agents of change; the importance of promoting and protecting ‘civil society space’⁵; the need to tailor protection interventions to meet the unique and specific needs of individuals, groups and communities⁶; and the necessity of complementing reactive measures with efforts to build a ‘safe and enabling environment’ for the defence of human rights.⁷

Second, the regime is goal driven – its aim is to protect and support defenders who operate in their own contexts in the face of threats and risks. Depending on the circumstances and the actors involved, these threats and risks might include surveillance, harassment, verbal and written threats, stigmatisation, criminalisation, restrictions on funding and registration as non-governmental organisations (NGOs), arbitrary arrest and detention, spurious investigations, fabricated charges, unfair trials, kidnapping, torture, ill-treatment and killings.⁸ Perpetrators range from state actors to non-state actors – such as government officials, armed forces, police officers, religious fundamentalists, transnational corporations and criminal gangs. In a significant number of cases, defenders do not know the identity of those who attack them.⁹

Third, the regime adopts a human security paradigm, with individuals, groups and communities as subjects of security rather than states. Its goal-driven, practice-oriented, rights-based nature helps actors in this regime sidestep some of the debates that question the usefulness of the human security paradigm for meaningful action, policy and research.¹⁰ Similar to proponents of a ‘broad’ human security approach (in particular, those who adopt a feminist framework¹¹), defenders and practitioners have emphasised the importance of having a holistic, multi-dimensional understanding of ‘security’. Women human rights defenders, in particular, emphasise the importance of understanding how discrimination, stereotyping and stigmatisation – rooted in social structures in society, such as patriarchy and the militarisation of society – compromise security.¹²

Jane Barry and Vaida Nainar reflect on how women human rights defenders define security as including: freedom from constant threats, economic security, political security, environmental security and health security, which resonate with definitions of human security that encompass the dimensions of ‘freedom from want’ and ‘freedom from fear’. Drawing upon reflections of women human rights defenders around the world, they introduce the term ‘integrated security’:

For us, security has to be integrated, which means employment, social wellbeing, development and national sovereignty in terms of natural resources. Security is not only for the individual, but also for the community.¹³

This concept – especially its emphasis on self-care and personal wellbeing – has resonated deeply with defenders around the world.¹⁴ Organisations that conduct security training (such as Front Line Defenders, Protection International and Tactical Technology Collective) draw attention to the importance of interventions in three interconnected domains – physical security, digital security and self-care. Some defenders and practitioners argue that self-care is both a necessary act of physical and psychological protection as well as a political strategy for sustaining and furthering the work of defenders.¹⁵

Fourth, it is a multi-level regime – formal protection mechanisms for human rights defenders exist at the national, regional and international levels. In Mexico, for example, defenders are able to seek protection measures from the government through the 2012 Law for the Protection of Human Rights Defenders and Journalists¹⁶; make urgent appeal to the UN Special Rapporteur on the Situation of Human Rights Defenders to request the government to take all appropriate action on behalf of a human rights defender at risk; gain practical support from European Union (EU) embassies on the basis of the EU Guidelines on Human Rights Defenders; and make petitions to the Inter-American Commission on Human Rights (IACHR) in the hope that it will request Mexico to adopt precautionary measures to prevent ‘irreparable harm’ to the defender. However, there is geographical unevenness in the availability of protection mechanisms. Many countries have neither enacted laws nor created institutions that recognise and protect the rights of human rights defenders.

Fifth, the regime has many stakeholders – civil society groups, donors, national human rights institutions, states, multilateral bodies and individual defenders – who create and use different types of tools, strategies and tactics to identify, support and protect the rights of human rights defenders. These include the provision of emergency grants, temporary relocation initiatives, security training, advocacy, accompaniment, trial monitoring, networking and capacity building.¹⁷

In the next section of this article we show how there has been growing commitment by some governments to protect human rights defenders around the world. We then contrast these developments with examples of how other governments continue to challenge the legitimacy of defenders and restrict their rights. We turn to three specific areas where critical scholarship is needed, highlighting the contributions of authors in this special issue: the definition and use of the term ‘human rights defender’; the effectiveness of protection mechanisms; and the complex relationship between repression, activism and risk. Emphasising the need for critical appraisal of the construction, function and evolution of this protection regime as well as its multi-scalar social and political effects, intended and unintended, we identify key areas for further research.

Developments in the normative framework

Over the past three years, there have been a number of initiatives that strengthen the normative framework for the protection of human rights defenders. At the national level, Switzerland’s Federal Department of Foreign Affairs published guidelines on the protection of human rights defenders in 2013, aimed at making the work of Swiss diplomats and officials in this area of work more coherent, systematic and effective.¹⁸ That same year, the United Kingdom issued its first National Action Plan to implement the UN Guiding Principles on Business and Human Rights, which included strengthening support to defenders engaged in business and human rights problems.¹⁹ In 2014, Côte d’Ivoire adopted the Law on the Promotion and Protection of Human Rights Defenders – the first African state to enact specific legislation to protect human rights defenders.²⁰

At the regional level in Europe, both the Council of the EU and the Organization for Security and Cooperation in Europe (OSCE) have strengthened their contribution to this protection regime through recent policy developments. In 2014, the EU marked the 10th anniversary of its European Union Guidelines on Human Rights Defenders by committing better support for vulnerable and marginalised human rights defenders, women human rights defenders and those operating in remote regions; advocating for the creation of a safe and enabling environment for human rights defenders; and strengthening the

implementation of an effective and coherent policy on human rights defenders.²¹ The OSCE (within its Office of Democratic Institutions and Human Rights) initiated extensive consultations with human rights defenders and other human rights experts across the OSCE geographic regions to develop the OSCE Guidelines on the Protection of Human Rights Defenders, published in June 2014, to harness better protection and support for human rights defenders by member states.²²

Internationally, in 2013, the Group of Eight (G8) adopted a Declaration on Preventing Sexual Violence in Conflict that acknowledged the vital role of women human rights defenders, committing to provide them with better protection.²³ In 2013, the UN General Assembly passed the first ever resolution on the protection of women human rights defenders.²⁴ The UN Human Rights Council has also passed a number of important resolutions that signify its commitment to the protection of human rights defenders. This included Resolution 22/6 on Protecting Human Rights Defenders in March 2013, which outlined the gravity of the deteriorating climate for human rights practice around the world. This resolution emphasised that more must be done to address attacks and reprisals against defenders, unjust laws that criminalise defenders, and impunity for actions against defenders.²⁵

States have also recognised that some human rights defenders are particularly vulnerable – such as those who work on contested issues (such as sexual and reproductive rights, and rights abuses related to extractive industries, land and the environment) as well as those who hold particular identities and come from specific communities (such as women human rights defenders, LGBTI (lesbian, gay, bisexual, transgender and intersex) defenders and indigenous people).²⁶ States have also raised concerns about the security of defenders in a number of ways, including through the Universal Periodic Review (UPR) process.

In 2014, the outgoing UN Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, used her last report to the Human Rights Council to set out a framework for building a ‘safe and enabling environment’ for defenders.²⁷ The new Special Rapporteur Michel Forst, in his first report, reemphasised the importance of disseminating the declaration and raising the visibility of the situation of human rights defenders. He committed to addressing national legislative impediments to the work of defenders; challenging impunity for human rights violations against defenders; and tackling reprisals against defenders, in particular those who engage with the UN and other international and regional human rights mechanisms.²⁸

Debates, tensions, contestation

While there have been positive developments in the evolution of this regime, some states continue to challenge the recognition, legitimacy and integrity of the work of defenders. Defenders continue to be attacked, even in countries where they have legally enforceable rights to promote and protect human rights. National laws and administrative practices that criminalise defenders have been justified by some states in terms of their measures to protect national sovereignty; counter terrorism and extremism; further economic security and development; and assert particular cultural, traditional and religious norms and practices. In September 2014, for example, the Egyptian government revised Article 78 of its Penal Code introducing severe penalties for those accessing or facilitating access to foreign funding. In India, every NGO receiving funds from ‘foreign sources’ requires either prior permission or registration under the Foreign Contribution Regulation Act (FCRA) 2010. This legislation has been used to target those dissenting from the economic

model pursued by successive governments that violates the human rights of Adivasi tribal peoples and other communities.²⁹

In countries where laws are enacted to criminalise human rights defenders' practice, more research is needed to document the immediate impact on defenders, and to consider how such laws may have wider regional influence and multi-sectoral impact. For example, following Russia's clamp down on civil society practice through oppressive legislation (i.e. limits on foreign funding for NGOs), we now see similar laws being debated by legislators in Tajikistan, Kyrgyzstan and Kazakhstan.³⁰ Such measures are used not only in repressive regimes but also in nominally or fully democratic states.³¹ In the United Kingdom, for example, the Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014 restricts civil society organisations (CSOs) in the period before an election by setting financial limits on regulated campaigning activities above which there is a legal duty to register. Indeed, the International Centre for Not-for-Profit Law has documented the introduction or enactment of measures to constrain civil society in more than 50 countries between January 2012 and December 2014.³² Protection-oriented actors who support defenders around the world struggle to respond effectively to this diverse and rapidly changing legal and administrative environment that impacts defenders. While there have been a number of notable initiatives to address these restrictions,³³ more research and analysis is needed to understand, prevent and respond to them effectively.

Another troubling development is the extent to which states conduct surveillance and share intelligence on defenders. In some cases, spurious intelligence reports and statements by public officials purportedly based on intelligence data misrepresent defenders and NGOs as impediments to economic growth and threats to national economic security.³⁴ States also continue to use anti-terrorism legislation and measures to criminalise defenders and restrict the activities of NGOs. For example, Uzbekistan has consistently used anti-terrorism laws as part of an aggressive campaign against defenders, criminalising – and in some cases torturing – them for purported religious extremism, terrorism and 'wahhabism'.³⁵ A number of states have also drawn upon Recommendation 8 of the Financial Action Task Force's International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation to regulate and restrict NGOs under the guise of preventing terrorist financing and money laundering.³⁶

Increasingly, human rights defenders find their recognition by and access to the UN under attack. The legitimacy and integrity of their work has been called into question during Human Rights Council sessions and in General Assembly resolutions related to human rights defenders and to civil society space.³⁷ This has been the case not only by states such as China and Eritrea that see any form of civic protest or challenge to state authority as anathema to social and political stability, but by democratic states with growing geopolitical influence, such as South Africa and India.³⁸ In addition to direct confrontation with the human rights defender framework within the UN, states hostile to the work of defenders impede defenders' access to the UN by delaying applications for United Nations Economic and Social Council (ECOSOC) status and engaging in reprisals against those who attempt to engage with human rights mechanisms.³⁹ There have also been cases where human rights defenders experience harassment, intimidation and threats during and following their engagement with the Human Rights Council. Such was the experience of journalist Gnanasiri Kottegoda from Sri Lanka in 2012, who was subjected to a state-sanctioned smear campaign. A pro-government TV channel broadcast images of him and called him a traitor. He was forced into hiding when military intelligence sought him out, and eventually fled the country. Some states have held back from working with the Special Procedures mechanisms, and some states have also demonstrated a lack of

engagement with requests made through the UPR process to protect the rights of human rights defenders.

The definition and use of the term ‘human rights defender’

Although the Declaration on Human Rights Defenders itself does not use the term ‘human rights defender’, in practice, the definition is derived from Article 1, which states that:

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

This term has been used to refer to a broad range of individuals and collectives promoting or protecting human rights, including lawyers, journalists, activists, trade unionists, members of community-based organisations, people in social movements and staff of human rights organisations involved in different work in very different contexts. It has been used to refer to those less obviously characterised as rights defenders, including protesters, teachers, students, social workers, health care professionals, community workers, sexual minorities, religious minorities and peace builders, amongst others.⁴⁰ The term ‘human rights defender’ tends to be invoked when those engaged in rights-related work are threatened or put at risk for what they do – it is a way of legitimising, bringing visibility to and reiterating their right to do this type of work.

There are clear reasons and benefits for using this term, not least that it confers on defenders recognition and status within the international human rights framework through which they can access support, protection and redress for violations. Furthermore, many funds, programmes and resources are specifically allocated for work related to human rights defenders, and NGOs and individuals who want to access these funds use this term in their proposals and activities. However, being called a human rights defender is not always advantageous – in some cases, the use of the term can inadvertently raise the level of risk that defenders face and be used to politicise their work. Some aggressors have also started to appropriate this term, referring to themselves as human rights defenders, to the consternation of civil society groups who see them as perpetrators of rights abuses.⁴¹

Protection-oriented actors are concerned about ensuring that the definition corresponds to the breadth of actors put at risk for defending human rights. Matters are complicated by the fact that, in many cases, human rights defenders do not refer to themselves as ‘human rights defenders’. Furthermore, the declaration and associated protection mechanisms do not set out clear decision-making processes to help with status determination.

The Office of the United Nations High Commissioner for Human Rights has tried to provide guidance on who should be referred to as a human rights defender through a fact-sheet called *Human Rights Defenders: Protecting the Right to Defend Human Rights* (henceforth Fact Sheet 29).⁴² Fact Sheet 29 suggests three ‘minimum standards’ required for a human rights defender: that the person accepts the universality of human rights; that the person’s arguments fall within the scope of human rights (regardless of whether or not the argument is technically correct); and that the person engages in ‘peaceful action’. However, some essential questions remain, including: To what extent does a defender need to demonstrate that his/her actions are ‘non-violent’? To what extent should a defender be expected to demonstrate knowledge of and respect for the universality of human rights? What criteria and process should be adopted to determine this?⁴³

Enrique Eguren and Champa Patel⁴⁴ (this issue) suggest that the current basis for this definition does not provide enough guidance for those determining if a specific individual, organisation, group or community is a human rights defender. They are concerned that such ambiguity potentially hinders the protection of defenders. Eguren and Patel argue for the development of a critical and ethical framework that focuses on analysing ‘what a defender does or does not do in context’, making it a *relational* definition rather than one of identity *per se*. This, they assert, provides a clearer framework for decision-making, which increases the effectiveness of protection mechanisms and forestalls misappropriation of the term by states or other aggressors. In their article, they analyse the three ‘standards’ presented in Fact Sheet 29 to show how critical theory can enable an ethical understanding of who behaves as a human rights defender.

The effectiveness of protection mechanisms

A frequent criticism of protection mechanisms – including by the Women Human Rights Defenders International Coalition – is that they often do not take a holistic, gender-sensitive approach to protection.⁴⁵ Defenders and practitioners have also expressed concern about the uneven and inconsistent protection and support provided to defenders, resulting in some defenders from particular groups and those in specific geographic regions being partially or completely excluded. There is scant research evaluating how different protection mechanisms perform for defenders.

Karen Bennett⁴⁶ (this issue) examines the effectiveness of the implementation of the EU Guidelines on Human Rights Defenders since the revision of this policy directive in 2008. Drawing upon participatory research conducted in Kyrgyzstan, Tunisia and Thailand, she identifies reasons for gaps in implementation and shortcomings in the integration of the guidelines in the EU’s human rights country strategies. Bennett points to good practice in implementation, but also barriers to and constraints upon the capacity and willingness of diplomats to implement the guidance and defenders from accessing the envisaged support. Bennett argues that the EU’s policy on defenders needs coherence with other EU human rights foreign policy commitments and that wider foreign and economic policy directives should adopt a rights-based approach that is inclusive of the guidelines. Bennett provides both a ‘practice’ and ‘policy’ review of how the implementation of the guidelines on human rights defenders, as an evolving regional mechanism contemporaneous with other EU human rights policy initiatives, can be utilised more consistently in supporting and protecting defenders.

At times human rights defenders at risk have also gained protection from an older, more established international regime – that created for refugees. Martin Jones⁴⁷ (this issue) observes there has been little attention paid to the intersection between these two protection regimes. Arguing that direct engagement can be productive, he suggests that the provision of asylum to individuals who flee because they champion human rights causes could provide new ideological currency to the refugee regime, which has seen the gradual erosion of popular support since the end of the Cold War. He also notes that defenders face an additional problem to the difficulties commonly experienced by other refugees – how to remain effective in their human rights work while living in another country. Tracing the development of ‘temporary international relocation initiatives’ for human rights defenders at risk, Jones suggests that these provide a productive example of the intersection of the two regimes. His contribution underscores the importance of examining the interaction between this evolving protection regime and other more established (protection) regimes.

Repression, activism and tactics for managing risk

A complex relationship exists between the repression of defenders and their defence of human rights; in some cases, repression triggers new forms of mobilisation and activism. The tactics and strategies that defenders use to manage their own security and to respond to risk are diverse, creative and highly adapted to local contexts. As some have observed, there is sometimes a gap between what defenders do and how transnational actors understand and support them, which can lead to ineffective protection and support measures.⁴⁸

Two articles in this collection examine the ways in which human rights defenders have developed and adapted tactics to respond to repression in non-democracies. Elisa Nesossi⁴⁹ (this issue) examines human rights practice by China's *weiquan* ('rights-defence') lawyers over a 12-year period (2003–2014), analysing how these lawyers use the courts and the media to protect vulnerable groups, challenge power and highlight problems with access to justice. Noting that the Communist Party has publicly denounced *weiquan* lawyers and that they work in spite of political adversity and direct personal risk, she observes that repression – paradoxically – creates new opportunities for action. In particular, Nesossi observes how *weiquan* lawyers maximise opportunities for change that emerge as a result of repressive action and divisions amongst the political elite; and that they do so with the support of influential allies, by drawing upon the diversification of the media, and through developing social networks.

In a similar vein, Laura Lyytikäinen and Freek Van der Vet⁵⁰ (this issue) provide useful insight into how two different groups of Russian human rights defenders – youth activists participating in public protest campaigns in Moscow and lawyers bringing the cases of victims of the conflict in Chechnya to the European Court of Human Rights – respond, perceive and manage the high levels of risk involved in their work. Drawing on research conducted from 2005 to 2013, at a time when the Russian State Duma passed a number of laws that significantly restricted the activity of defenders, these authors show how human rights defenders who operate in highly repressive contexts experiment with new tactics to conduct advocacy, manage fear and challenge the boundaries of state power. These tactics include developing flexible work methods, routinising protest, building legal literacy and mental resilience and using vulnerability to demonstrate state violence and repression.

Key reflections and ways forward

Amongst some defenders and practitioners, we see growing consensus about what constitutes 'security' and 'protection', and how this is to be achieved, by whom and for whom. However, while systematisation and standardisation in protection activities can provide some clarity about who should act, how and to what end, there is also a risk that orthodox ways of thinking will result in rigidity and exclusivity in policies and practices. As such, they may fail to keep pace with emerging threats to defenders, the changing nature of civic action, and actors and actions that promote and protect human rights. The five papers in this special issue provide timely and important contributions that raise vital questions about the evolving protection regime for human rights defenders. Yet, critical gaps in knowledge and understanding remain.⁵¹ In particular, these articles point to the need for further research on:

- The construction, function and evolution of the human rights defender protection regime (including changes in its 'strength', 'organisational form', 'scope' and 'allocation mode'⁵²). This includes examining: the means and conditions under which state and non-state actors cooperate with each other to strengthen – or undermine – the protection of defenders; how power, interests and knowledge shape the

protection regime; the governance of protection mechanisms and how those that operate at different levels relate to each other; how this protection regime relates to other international (protection) regimes; and how different factors such as technological evolution, regional security concerns, and political alliances influence this protection regime at different levels;

- Issues arising from the institutionalisation of the definition of ‘human rights defender’. This includes examining: the benefits and drawbacks of the use of this term; to whom it is applied and to whom it is not; the power-relations, politicisation, inequality and ethical issues that arise from the use of this term;
- Perceptions of and attitudes to risk amongst human rights defenders. This includes: the subjective conceptualisation of ‘security’ and ‘protection’; the relationship between the social construction of risk and identities; the strategic use of risk for advocacy; the security behaviours of defenders in the way they manage their risk; how defenders build resilience and strategies for safety in different types of risky environments; how culture, gender and diversity give rise to protection needs for those who challenge societal and institutional discrimination, especially women and LGBTI rights defenders;
- How the quality, quantity and type of networks – amongst human rights defenders and between them and their supporters – have protection effects. This includes: the relationship between trust, solidarity and security; the way stigmatisation is resisted through counter-narratives and community support; how alliances are built, and how they are weakened; and how local relationships have been reconstituted in the light of the development of the protection regime for human rights defenders.

We strongly encourage the facilitation of collaborative research and the circulation of ideas between academics, practitioners and defenders. This might be through: academic research, seminars and conferences; research embedded in civil society programmes and projects; and more strategic and sustained *foci* in the form of new research hubs that develop theory and practice related to ‘risk’, ‘security’ and ‘protection’. Such initiatives help us to interrogate how the protection regime for human rights defenders has evolved and strengthens our imagination of what it should be.

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 38. The language used by these states during debate of resolutions on human rights defenders and on civil society at UNHRC 25 and 27, for instance, repeatedly refers to the 'responsibilities' of human rights defenders and CSOs to 'act within domestic law' (without acknowledging that said domestic laws often contravene international human rights law), accuses human rights defenders and CSOs of allowing themselves to be manipulated by foreign funders seeking to undermine national sovereignty, or of pursuing 'erroneous ideologies', and insists they act 'ethically' and with greater 'transparency and accountability'. Coming from states that use laws to restrict freedoms of association, assembly and expression to criminalise and prevent dissent, this represents an ominous, thinly veiled message.
 39. Criticism has been made by NGOs and even UN Special Procedures of states blocking NGOs through deferral by the Committee on NGOs that scrutinises NGO applications for ECOSOC status. See: http://www.ishr.ch/sites/default/files/article/files/letter_to_us_secretary_of_state_re_idsn.pdf (accessed 16 June 2015).
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 48. Masa Osama Amir, 'A Study of the Experience of Women Human Rights Defenders in Eleven Egyptian Governorates', *Journal of Human Rights Practice* 5, no. 3 (2013): 460–77; Kogan, 'Protecting Human Rights Defenders in the North Caucasus'.
 49. Elisa Nesossi, 'Political Opportunities in Non-Democracies: The Case of Chinese *weiquan* Lawyers', *The International Journal of Human Rights* 19, no. 7 (2015): 961–978.
 50. Laura Lyytikäinen and Freek Van der Vet, 'Violence and Human Rights in Russia: How Human Rights Defenders Develop their Tactics in the Face of Danger, 2005–2013', *The International Journal of Human Rights* 19, no. 7 (2015): 979–998.
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