

Scaling up initiatives to protect human rights defenders

Consultation summary note (30 November, 2017)

Introduction

On 30 November 2017, the UN Working Group on Business and Human Rights (UNWG) convened an open multi-stakeholder consultation in Geneva on the role of business in relation to human rights defenders and civic freedoms. The aim of the consultation was to help inform the UNWG's ongoing work on this topic. The consultation title was "Scaling up initiatives to protect human rights defenders". It sought in particular to examine how current models to protect and respect of human rights defenders when there is a connection to business are working, how to address key challenges, and how to amplify existing efforts.

Around 50 participants from business, civil society (including human rights defenders from different regions), governments, multi-stakeholder initiatives, national human rights institutions, and the UN attended. The present document contains a summary of the key messages from the discussion.¹

Background

The closing of civic space and increasing attacks on human rights defenders (HRDs) speaking up against business-related impacts on people and the environment have brought into sharp focus the need for increased protection and promotion of HRDs. The work of defenders in the field of business and human rights is critical; HRDs help to identify potential human rights impacts arising from business activity and are crucial actors in the mitigation and remediation of such abuses.

At present a number of business organizations, individual companies and multi-stakeholder initiatives are working at different levels to promote and protect the work of human rights defenders. Some of these initiatives include:

- Individual companies or business organizations joining informal business networks in collaboration with civil society organizations to explore actions businesses can take to protect civic freedoms and human rights defenders.
- Trade association responses to specific cases of reported attacks against HRDs.
- Company-level policies to respect and protect HRDs.
- Multi-stakeholder initiatives (MSIs).

In recognition of the strong linkage between HRDs and responsible business conduct, the UNWG has launched a project to [develop guidance to help strengthen state protection of and business respect for HRDs](#) in line with the [UN Guiding Principles on Business and Human Rights](#) (UNGPs), informed by a series of multi-stakeholder consultations. A [first consultation in the UNWG's current project was held in May 2017](#). The 30 November consultation followed on directly from multi-stakeholder

¹ A blog summary is available at: <https://business-humanrights.org/en/protecting-and-respecting-those-who-speak-up-against-business-impacts-on-human-rights-takeaways-from-the-un-forum-and-the-way-forward/> / <http://blog.journals.cambridge.org/2018/01/25/protecting-and-respecting-those-who-speak-up-against-business-impacts-on-human-rights-takeaways-from-the-un-forum-and-the-way-forward/>

discussions on related topics during the [2017 UN Forum on Business and Human Rights](#) (Geneva, 27-29 November). In particular, it was linked to a [session co-organized by a number of NGOs in collaboration with the UNWG](#) on 28 November.² Directly before the consultation, the UNWG issued a paper to help identify [elements for its forthcoming guidance on human rights defenders, civic space and business](#).

Summary of key messages

The discussion focused mainly on challenges (many of which relate to wider rule of law gaps); the role that some key actors in position and with a responsibility to address such challenges might play; and how to amplify existing efforts to respect and protect HRDs.

I. Challenges highlighted by HRDs and civil society

Framing and “translation”

- In general, there is a need to unpack the terms of HRDs and civic space, and use vocabulary and concrete examples that are understood by business in the local context. The situation for HRDs can be highly contextual depending on the country and sector situation, and the language and framing are important for ensuring that the issue comes higher on the agendas of the private sector and relevant government actors.
- Typically companies do not understand the role of HRDs, or their intentions. They may be perceived or labelled as profit-seekers or foreign agents, for example, rather than representatives of victims of human rights abuses
- A common challenge for business is the lack of understanding of a company’s responsibility when sourcing from a country or sector where attacks on HRDs and civic freedoms are a significant risk, but where the company does not appear to be causing or contributing to the adverse impacts (i.e. a “not affecting me right now, so not relevant”-attitude). Rather, the company may be directly linked to the adverse impacts.
- An example from Latin America was highlighted, where the issue of HRDs and civic space is not an obvious one to companies. This relates both to the challenge of unpacking terms and the observation that the issues involved are often viewed as “political” and less relevant to business. Often the role of HRDs is linked to the issue of land rights and land reform movement, which is closely linked to decades of social struggle and discriminatory practices.
- Many participants noted that there is a pressing need to change the narrative relating to HRDs who work on business and human rights issues. Rather than seeing them as obstacles, or as threats, work needs to be done to see them as key partners, who can assist business in identifying key human rights impacts early. As the UNGPs indicate, HRDs should be part of a company’s stakeholder engagement, and due diligence processes.

“Root causes”

- Gaps in rule of law are perhaps the biggest challenge for making comprehensive progress in terms of ensuring the respect for the rights of HRDs. Key issues identified include corruption,

² Video link available at: <http://webtv.un.org/search/remedying-redressing-preventing-attacks-forum-on-business-and-human-rights-2017/5658096243001/?term=Forum%20on%20Business%20and%20Human%20Rights%202017&lan=english&sort=date>

criminalization of dissent (i.e. arresting and prosecuting defenders for exercising right to protest or seek legal redress), lack of consultation processes, dysfunctional judicial mechanisms and impunity for perpetrators of serious human rights violations.

- Two key root causes of attacks or harm to HRDs are lack of free, prior and informed consent as well as wide-spread corruption. These “root causes” were identified in a study of one Latin American country where HRDs address business-related impacts frequently. When coupled with impunity, this provides “oxygen” to attacks on HRDs. The existence of the underlying issues create the need for defenders to speak up about the harms that communities and rights-holders experience due to lack of free, prior and informed consent as well as harms linked to bribery and corruption.
- Often state and business responsibilities are intertwined, and there is a need to consider the role of “corporate capture”. In other words, government actors may respond to the needs of influential businesses, and in doing so may marginalize HRDs or infringe on their rights.
- State institutions that could play a role in supporting HRDs may lack sufficient independence to actively protect HRDs. For example, not all national human rights institutions (NHRIs) are equipped with a mandate or resources to operate independently of the government.
- While a growing number of big multi-national companies are beginning to pay more attention to the issue, a majority of state-owned enterprises (SOEs) and small/medium sized enterprises (SMEs) have low awareness or interest in tackling the issue, and may be more closely connected to human rights abuses.

Retaliatory actions – Strategic litigation against public participation (SLAPP) and criminal prosecution

- A worrying trend is the use by corporations of strategic lawsuits against public participation (SLAPP) to sue HRDs. This tactic to silence HRDs, civil society organizations (CSOs), journalists and academics that raise complaints against companies are now becoming more prevalent and also impacting a larger number of HRDs and CSOs. SLAPPs place heavy financial burdens on NGOs and have a chilling effect on HRDs and affected rights-holders.
- NHRIs are not immune against SLAPPs either. One example given involved how oil companies had put pressure on the NHRI in one African country through threats of lawsuits.
- Examples of other forms of retaliation against HRDs included criminal prosecution or threats about prosecution. One example involved a situation where complaints by HRDs filed in company-run grievance mechanisms have triggered prosecution of HRD, and where companies are sometimes involved in the prosecution. Another example provided from an African country involved threats against HRDs that had complained about a abuse by security companies, where the HRDs were pressed to deny the complaints.

Use of legislation to restrict HRDs and civil society space

- A related trend involves the use of laws and new legislation to restrict the ability of HRDs and CSOs to raise concerns about adverse business impacts on people and the environment.
- An ongoing challenge is the threat of legislation which may restrict the scope of work by civil society groups, in the name of national security. Legislation, for example may allow a government to disband or crack down on NGOs in the name of national security. Such laws are used against HRDs to stifle protest and advocacy. There are examples of companies standing behind the application of such laws to target HRDs.
- Another example related to how civil society groups are financed and licensed, and related government action to restrict the work of HRDs and the organizations with which they work. For example, governments have prohibited civils society groups form receiving foreign funding, or have required approval of receipt of such funds.

Uneven "playing field" and inequality of arms in the legal system

- Typically companies have access to the best lawyers, which puts HRDs at a particular disadvantage when they are being targeted by private actors or public agents.
- In countries characterized by "weak governance", big companies often also have better legal support than state institutions that could play a role in facilitating better protection of HRDs.
- Related to this, local lawyers often do not have sufficient understanding of the role of legitimate HRDs, in particular when laws are being used against HRDs.
- While law firms can provide pro bono support for HRDs and CSOs representing affected rights-holders, they may also face real conflict of interest issues. The example from one African country was mentioned, where the biggest law firms typically work for mining firms and face conflict of interest if asked by communities for legal support.

II. Roles of key actors in addressing current challenges and amplifying up efforts to defend HRDs

States

- States are enablers of the legal regime that can be used to restrict threaten, intimidate or silence defenders, including SLAPPs and other legal mechanisms. States must put an end to such practice that negatively affects the legitimate activities of HRDs and CSOs that address adverse impacts of business activities. With regard to this point, it was suggested that it would be useful if the UNWG were to unpack use of SLAPPs and laws that restrict the work of HRDs, in order to highlight the inconsistency with the UNGPs of such practice.
- The issue of policy coherence, which is addressed by UNGPs 8-10 in particular, is very relevant for the "enabling environment" for HRDs and civil society participation in the context of policy development and other government action relating to domestic and transnational economic activity.. For example, state action (and UNWG guidance) should consider how civil society participation can be ensured rather than hindered in the context of licensing and investor contracts and agreements, such as awarding of mining concessions. In a European context, it was suggested that the EU Raw Materials Initiative provide a concrete link for strengthening policy coherence.
- It was suggested that there opportunities presented by implementation of the French duty of vigilance law, as companies within its jurisdiction are required to consult with stakeholders and map human rights risks. Companies may potentially be held to account if they fail to act on information provided by NGOs and others.
- Protection of HRDs should be more pro-actively addressed in national action plans (NAPs) on business and human rights. Currently several NAPs address the role of HRDs, but more in the form of "box-ticking" and reiterating the need for consulting with HRDs on the ground, rather than concrete actions that might support a conducive environment for HRDs.
- States can help leveling the playing field between companies and HRDs, for example through legal aid frameworks and legal reforms.
- States can play a convening role, by supporting platforms for business-to-business as well as multi-stakeholder engagement to raise awareness and promote concrete actions in support of better protection and respect of HRDs.
- The role of embassies was highlighted, as they can play a positive role in many respects. For example:
 - They play an important convening role, but they also need to think of whom to involve in the process and not just their usual counterparts.

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- A strengthened role may be achieved through training and providing particular staff with enhanced responsibilities.
- They can carry out training on business and human rights, responsible business conduct and use of grievance mechanisms – for embassy officials, firms and local governments – and help disseminate tools.
- One example involved a European government’s embassy in a Latin American country with high prevalence of attacks against HRDs in the context of business operations. The embassy included the issue on the agenda of business and investor delegation meetings with the local private sector. CSOs considered it particularly useful when foreign investors are part of efforts to address risks to HRDs in dialogue with local business actors.

NHRIs

- Independent NHRIs have a clear role to play in protecting and supporting HRDs, as they provide direct access to engaging the relevant state institutions
- When a transnational corporation is linked to a situation involving attacks on a HRD, there is an opportunity to engage the “home NHRI”. This is so far an untapped terrain that has considerable potential to contributing towards scaling up efforts to defend HRDs. The Global Alliance of NHRIs in particular could explore this further.

Companies

- Both HRDs and CSOs recognized that more companies are taking positive steps to respect and defend HRDs and civic freedoms. They stressed the need to build on the examples of positive business engagement.³
- In countries characterized by “weak governance”, companies need to be particularly cognizant of power dynamics and their own role in that regard. In such contexts, they can prevent adverse impacts on HRDs by trying to understand the situation on the ground and consulting with local communities. Companies can create platforms for exchange before operations begin and ensure that international/group level commitments and policies are being followed on the ground.
- More companies need to put in place or participate in operational-level grievance mechanisms, and grievance mechanisms need to take the situation of HRDs into account.
- Beyond steps to respect and defend HRDs when there is a direct link to business operations, business can also address situations where laws are being introduced and used to restrict HRDs and civic space.
- Companies should not advocate for legislation that restrict civil society space as this is contrary to the UNGPs. Companies should also understand that open civic space is beneficial to business (which is being recognized by a growing number of business leaders).
- With reference to the current context in one Latin American country, it was noted that there is a window of opportunity when society’s trust in business is low, as business leaders realize there is a need for multi-stakeholder dialogue. How to bring this about in practice needs to be worked out, however, also considering the role of a push from the international level.
- Multinational corporations have a role to play in business-to-business awareness raising and helping “translate” the UN’s human rights language so that it is understood in a local

³ A key resource is the Business & Human Rights Resource Centre’s portal on the issue: <https://www.business-humanrights.org/en/bizhrds>

business context. An example from one Asian country was provided, where the involvement of a foreign company in support of a HRD led to change among some local companies.

- Multinational corporations could also help fund legal support to HRDs (if appropriate safeguards are put in place).
- In order to support companies take concrete actions to respect and support HRDs and civic freedoms, the Business & Human Rights Resource Centre (BHRRC) and the International Service for Human Rights (ISHR) are currently developing guidance for companies with concrete criteria for interventions in situations where HRDs and civic freedoms are under threat. It is meant to complement other documents that have addressed this issue over the last few years.
- It was stressed that for there to be wider understanding of these issues among business, there is a need to unpack at the sector level.
- Several participants argued that even when companies are not directly linked to adverse impacts on HRDs in a country they are sourcing from, they have an ethical responsibility to take positive measures. In terms of clarifying why they have such a responsibility, the analogy to investor pressure on companies to contribute to the trust fund for victims affected by Rana Plaza was given. Some companies were saying that they were not involved in Rana Plaza, so did not think they should join the trust fund, “simply” because they were sourcing from the garment sector in Bangladesh. However, the argument used was that if you have been in the industry for years and benefitted, you also have a broader responsibility.

III. Leverage of third parties

Law firms

- The role of law firms was repeatedly addressed, as leading law firms could play a bigger role in pro bono support to HRDs. There are models to build on, e.g. TrustLaw, which provide support to HRDs. The UNWG could also play a role in helping advance more pro bono legal support to HRDs and affected communities.⁴
- Law firms are often playing a helpful role in efforts to develop corporate policy. However, when representing a client who is involved in a situation where HRDs are negatively affected, the conflict of interest is real. There is a need to think more creatively about legal aid schemes.
- When law firms are involved in supporting private investors and/or states in the context of investment contract negotiations – and in particular in countries where HRDs are at risk – they should also bring their expertise on business and human rights to bear as part of their own responsibilities.

Investors and international financial institutions

- It is key to engage investors regarding their responsibility and to utilize the voice of investors. For example, investors can play a role in ensuring that the issue is being incorporated into corporate policies of companies operating in countries and sectors where risks to HRDs are high.

⁴ During the UN Forum on Business and Human Rights on 27-29 November 2017, the UNWG convened a session to explore possibilities of establishment of a global network of pro bono lawyers: <http://www.ohchr.org/Documents/Issues/Business/ForumSession6/AccessToRemedyBonoNetwork.pdf>

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- Generally, investors need to do more, both at policy level and on the ground. It was noted that there is a need for more guidance on *how* investors can engage on the issue of HRDs and civic space on the ground.
- It should become second nature for investors to understand that HRDs and civic space matter. Currently it often only becomes tangible when there is a conflict between a company and community/workers. Investors should understand that long term sustainability is about building the community.
- The role of international financial institutions (IFIs) is also important in many countries, including in extractive sector investments. UNGP9 addresses the responsibility of IFIs, which could and should include due diligence elements in contracting and guidance.

Multi-stakeholder initiatives (MSIs)

- MSIs can only be sustainable if they react to situations where HRDs are being targeted. Ultimately the credibility of MSIs is at stake.
- Several MSIs are equipped to address situations of HRDs or civic freedoms being targeted, but have not reached their potential. CSOs and others supporting HRDs need to work with the established platforms, but also explore ad hoc ones.
- MSIs can be useful platforms for collective action and for engaging states.
- MSIs that have policies not to get involved in “political” issues should review their current approach so that they may be in a position to react when HRDs and civic freedoms are under threat in their sector/geography.
- It is important that MSIs are plugged into regional contexts. It is the only way to build legitimacy and ensure that actions are cognizant of the local cultural context.
- There is a need to explore the type of response models that can work when the issues at stake are urgent (which they tend to be when HRDs are being targeted for speaking up against business-related impacts).
- MSIs need to address the existing barriers for raising complaints in the context of MSI-facilitated grievance mechanisms and processes.

Business networks and business leaders’ initiatives

- One example of a model that brings people together in some countries is Global Compact Networks. They play a role in raising awareness on human rights responsibilities and potentially supporting multi-stakeholder engagement. Their potential could be tapped into to a much larger extent.
- It is encouraging that more industry associations and business leaders’ initiatives (e.g. B Team⁵) are recognizing that business has an inherent interest in defending HRDs and civic freedoms.
- Business practitioners networks (e.g. the business network convened by BHRRC and ISHR) can help explore the practical actions companies can take. This applies to both situations of standing up for individual HRDs and how as a collective group they can exert their leverage with suppliers and governments.
- More business actors need to be exposed to the issue, and there is a trust-building and educational process that needs to happen in order to build the issue into business “DNA”.

⁵ See <http://bteam.org/announcements/its-time-for-business-to-act-on-threats-to-civic-rights/>.

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Business leaders' initiatives have a pioneering role to play in this regard, including by disseminating the "business case" and helping change the narrative.

- In order to build real scale, it is necessary to engage trade and business associations. One suggestion was to engage CEOs of well-known companies in calling on chambers of commerce to pay attention to the issue.

Concluding messages

- It is important to underline that HRDs are not against development. In the words of Michel Forst, UN Special Rapporteur on the issue of HRDs, they are only against "fake development".
- It was recognized that there is a time for quiet versus public diplomacy; sometimes naming and shaming works, but not always. When exploring public engagement, it is important to bear in mind that it can cause more harm, so the victims or the NGOs on the ground need to be involved
- Further efforts should build on the examples of positive business engagement seen to date.
- There is a need for further initiatives to forge partnerships between actors in a position to play a part in the scaling up of greater respect and protection of HRDs and civic freedoms.
- The UNWG is continuing its efforts to support this agenda. It is welcoming ongoing inputs on its forthcoming guidance⁶ as well as on how it may contribute to coalition-building in this area.

⁶ See: <http://www.ohchr.org/EN/Issues/Business/Pages/HRDefendersCivicSpace.aspx>.