

Human rights defenders and civic space – the business & human rights dimension

Developing guidance on the role of the private sector in relation to human rights defenders and preserving civic space as well as identifying opportunities for coordination and collective action

Informal summary of workshop convened by the UN Working Group on Business and Human Rights (Geneva, 11 May 2017)

Background

The safety and security of human rights defenders (HRDs) and increased threats to civic freedoms has become a growing public concern. The role of business has been called into question with respect to its role in contributing to attacks against HRDs, but also its role in helping to protect defenders and support human rights. While it is one of the most urgent issues for the business and human rights agenda, due to the increasing scale and seriousness, there are also emerging efforts by a range of actors seeking to address the problem.

The UN Working Group on Business and Human Rights has decided focus on this critical issue in its own work and has identified activities it proposes to undertake to complement and support efforts by others, including to (i) develop guidance for business on engaging, respecting and supporting human rights defenders in line with the UN Guiding Principles on Business and Human Rights (UNGPs) as well as the role of business in preserving civic space; (ii) facilitate multi-stakeholder dialogue among stakeholders with an interest in the issue, so as to develop coordinated efforts; and (iii) help identify and support new opportunities for collective action.

These aspects provided the focus for the workshop organized by the Working Group on 11 May 2017 during its 17th session. This was the first consultation in the Working Group's current project on the issue, and it aims to consult further with a wider range of stakeholders, including human rights defenders themselves. Inputs will be sought through the Working Group's country visits and participation in meetings in other parts of the world as well as through written inputs. Further information is available in the Working Group's background note on this issue.¹

¹ http://www.ohchr.org/Documents/Issues/Business/ForumSession6/UNWG_ProjectHRDsBackgroundNote12052017.pdf

1. Introduction

The UN Working Group on Business and Human Rights (UNWG) convened a multi-stakeholder workshop in Geneva on 11 May 2017 to generate ideas for its work on the issue of the role of business in relation to human rights defenders and preserving civic space. More than 40 representatives from business associations, civil society organizations, companies, a national human rights institution and the UN as well as human rights defenders participated. This informal summary aims to capture the key messages from the discussions under the following headlines:

- Human rights defenders, civic space and the role of business – Key current issues and ongoing efforts
- The role of states
- Elements of good business practice in relation to preventing and addressing impacts on human rights defenders
- What role for business in addressing impacts on civic space
- Recommendations for UNWG guidance and action in this area

2. Human rights defenders, civic space and the role of business – Current situation and ongoing efforts

The Business and Human Rights Resource Centre (BHRRC) has compiled information about 460 cases involving impacts on human rights defenders during 2015-16. The BHRRC analysis suggests that the most dangerous sector is extractives, followed by agri-business. According to the same analysis, the six most dangerous countries for human rights defenders addressing the impacts of business are in Latin America, followed by the Philippines. Findings reveal that 25 per cent of companies involved in allegations are headquartered in Canada, China and the United States. Recent analysis of challenges faced by land rights defenders indicates that threats are growing, as according to one forthcoming study by Global Witness, as many as 200 were killed in 2016.

The criminalization of the activities of human rights defenders is a major concern. For example, defenders may be arrested for engaging in legitimate forms of assembly and protest. They may also be described by government entities as criminals and wrongdoers. It was noted that there has been an upsurge in criminalization especially in Central America. Human rights defenders and the organizations supporting defenders experience that there is a foreclosing of their ability to exercise their legal rights, and that that business, including transnational corporations, are able to take advantage of laws to initiate legal action against defenders. In some countries in that region, constitutional reforms are adding restrictions to the rights of defenders. Many governments are also restricting the activities of civil society organizations, including ones that receive foreign funding, through legislative reforms. These laws restrict CSOs' abilities to register, protest, and access information and resources. Civil society organizations report that, generally speaking, they are not seeing efforts by business to speak up against such reforms.

Participants also heard about the emblematic case of Andy Hall who has been subjected to criminal targeting and harassment for his work to document abuse of migrant workers in Thailand. It was noted that such legal action is having a chilling effect on migrant workers and the work of human rights defenders.

Killings and criminalization of human rights defenders are prime concerns. Human rights defenders often find themselves at risk when they are engaged in trying to protect the rights of communities adversely impacted by various types of extractive or development projects where there has been a general lack of proper consultation with communities. Many companies are not aware of or adhere to guidance for good practice consultations and community relations. It was noted that some companies even use social impact assessment processes as scouting exercises to identify “troublemakers”. As a result, many communities become disillusioned and turn away from consultation processes. Thus, one message that was conveyed early in the meeting was that there is much room for business to engage in better consultation and human rights due diligence, as called for in the UN Guiding Principles. Companies, when engaging in robust consultation and due diligence, have a chance to identify key civil society actors, and to engage constructively with them at the outset.

Participants recognized that company engagement to respect and support human rights defenders is still far too rare. One good practice example from the Andy Hall case was presented in the workshop, and other well-known examples were referenced in the background material for the discussion.² It was noted that there are also encouraging recent examples from the United States and the ICT sector.

With regard to recently launched and forthcoming efforts to address the challenge, participants flagged the following:

- The launch of the Business & Human Rights Resource Centre’s database on attacks on human rights defenders.
- The International Service for Human Rights and the Business & Human Rights Resource Centre are convening a business network to explore drivers and motivations for companies to take pro-active steps in support of human rights defenders and civic freedoms.
- A report by CIVICUS on the private sector and civic rights.
- A forthcoming annual report by Global Witness to document challenges faced by land rights defenders.
- A forthcoming case study by Oxfam on an example of two companies engaging with human rights defenders in the context of a human rights impact assessment in Brazil.
- The UN Special Rapporteur on human rights defenders’ report to the 2017 General Assembly focused on land rights defenders, with recommendations to a series of stakeholders, including companies and international financial institutions.

3. Role of states

While the key focus of the workshop was the role of the private sector in relation to human rights defenders and civic freedoms, it was emphasized that states have the primary obligation to protect. Participants agreed that business has a role to play, but that this should not take away from the responsibility of states. At the same time, it was noted that the reason for having the discussion in the first place is that states are failing in their task, or that states and businesses may sometimes be aligned in their actions against human rights defenders.

² See the Working Group’s background note (page 6, in particular):
http://www.ohchr.org/Documents/Issues/Business/ForumSession6/UNWG_ProjectHRDsBackgroundNote12052017.pdf

One aspect with regard to the role of states underlined by participants was that in some parts of the world, including in parts of Asia and the Middle East, it is often hard to distinguish between business and government actors. Business is often dominated by the state, state institutions (such as the military) or individuals close to the State. Participants noted that the state-business nexus with respect to respect and protection of human rights defenders, should lead to reinvigorated calls for implementation of state obligations in such contexts. For example, state-owned enterprises might have heightened duties with respect to addressing the situation of human rights defenders. It was also noted that publicly owned companies are overrepresented on the side of attacks in the database of the 460 above-mentioned cases, and there appears to be a sense of impunity among many businesses that are owned by governments. In this regard, the UNWG's report on applying the UNGPs in the management and operations of state-owned enterprises could be used to engage states and publicly owned business on the issue of human rights defenders.³

Participants also recalled the role of home states in protecting and supporting human rights defenders. A recent ministerial statement by the Government of the Netherlands encouraging Dutch companies to respect human rights defenders and calling on other governments to support human rights defenders working on corporate accountability was lauded. It was noted that it would be useful to see similar statements from other governments.

Other considerations regarding the role of states included the needs to incorporate challenges faced by human rights defenders in state-based national action plans and to engage national human rights institutions on the issue.

4. Elements of good business practice in relation to preventing and addressing impacts on human rights defenders

The UNGPs include a few references to human rights defenders, mentioning them as a specific source of expertise to be consulted as part of corporate human rights due diligence, and the need for protecting their freedoms in relation to remedy proceedings.⁴

The need for business to take the situation of human rights defenders into account is not a new expectation. Participants noted that under the UNGPs, when human rights defenders speak up in relation to impacts of a company's operations, products or services, or about its business relationships, and then faces harm, a business enterprise will necessarily be directly linked even if it has not contributed to those impacts.

Moreover, it was noted that beyond the explicit references to human rights defenders in the UNGPs, the general guidance provided on corporate human rights due diligence is also relevant in this

³ See http://www.ohchr.org/Documents/Issues/Business/ExSummary-WGBHR-SOE_report-HRC32.pdf

⁴ The commentary to Guiding Principle 18 states that " To enable business enterprises to assess their human rights impacts accurately, they should seek to understand the concerns of potentially affected stakeholders by consulting them directly in a manner that takes into account language and other potential barriers to effective engagement. In situations where such consultation is not possible, business enterprises should consider reasonable alternatives such as consulting credible, independent expert resources, including human rights defenders and others from civil society." The commentary to Guiding Principle 26 notes that "States should ensure that they do not erect barriers to prevent legitimate cases from being brought before the courts in situations where judicial recourse is an essential part of accessing remedy or alternative sources of effective remedy are unavailable. They should also ensure that the provision 29 of justice is not prevented by corruption of the judicial process, that courts are independent of economic or political pressures from other State agents and from business actors, and that the legitimate and peaceful activities of human rights defenders are not obstructed."

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context. It was suggested that human rights defenders can be a resource for companies to help them putting policies and processes into practice. For example, companies can engage directly with communities and human rights defenders when conducting human rights impact assessments.

It is important for companies to take a preventative approach, and understand that stakeholder engagement and consultation are critical. In many cases, problems start even before the company arrives on the ground. Agreements and licenses may be granted behind closed doors. Governments may have engaged in improper land acquisition, displacing communities in advance of a proposed project. When the lead company arrives, human rights defenders may already be active, raising concerns about adverse human rights impacts that require mitigation or remediation. Human rights defenders are vital sources of information, and early engagement could prevent impacts from arising.

When issues related to human rights defenders exist in the supply chains of transnational corporations, frequently risks are not identified at an early stage, as risk assessments are done at export level or via desk research and consultancies only. This remains typical even if there is a growing willingness for assessments to dig deeper and to engage with human rights defenders and communities. A positive example of companies addressing root causes was seen in Cambodia when international brands came together with NGOs to speak up against government attacks on union leaders. It was suggested that it should not be so difficult for companies to engage with human rights experts, as they reach out to experts on other areas, such as finance and investment, regularly. At the same time it was recognized that human rights challenges are more sensitive than most other risks, and that in many cases business models are part of the problem. Therefore there is a need for forums where businesses can speak openly with human rights defenders and unions about risks and concerns.

Respecting and protecting defenders should be considered a “pre-competitive” issue, so it should be in everybody’s interest to find solutions. There is a need to engage the supply chain as a whole, and sourcing companies should signal that they will only work with suppliers who respect human rights defenders, unions and freedom of association. Speakers also emphasized that greater transparency along supply chains could make a significant contribution. Typically workers do not know what brands they are supplying to, so it is difficult to address abuses. Such difficulties are compounded when workers are not organized and there are increasing threats against unions and human rights defenders supporting workers.

Lessons learned by companies suggest that the level of engagement would be defined by the role of the company, whether a situation is linked to its own activities or through supply chains or other business relationships. Respect should be the first step, which would require having a human rights due diligence process in place that includes assessing actual or potential threats to human rights defenders. Companies can also make their own policies clear to the public, thus helping to raise the bar with respect to creating an enabling environment for human rights defenders.

Often it is difficult for one company to act on its own, so it should mobilize its networks and business organizations as well as relevant embassies to address specific threats to defenders, as well as systematic issues, such as changes to laws that might impede civil society from properly engaging on

human rights issues. Engagement helps making the issue visible. Challenges faced by companies to actively engaging in cases to support human rights defenders include:

- Building trust with human rights defenders and NGOs.
- The need to secure internal support and top level buy-in.
- The need for good cooperation between legal and CSR departments.
- Allocation of sufficient time and resources.
- The need for new kinds of skills and networks.
- The need to gather timely and accurate information.
- How to estimate the real risks for the human rights defender and for the company of taking actions or making statements.
- The need to take into account potential legal risks if taking a public stance and testifying.
- The need to ensure that everything is being documented.
- The need to define/adjust policies in order to be prepared to address similar situations in the future.

Some speakers suggested that the issue of respecting and engaging human rights defenders as part of the corporate responsibility to respect human rights on the ground in practice is not really separate from the issue of supporting civic space. It was noted that companies can provide protection to human rights defenders through recognition and standing with defenders, and companies play a supporting role by recognizing the need for an enabling environment where individuals can get legal support, journalists operate freely, and where affected individuals and communities can have access to remedy. Business support for an enabling environment includes demonstrating respect for freedom of association and respect for critical NGO voices. Participants noted that companies could help in a variety of ways:

- Leverage: companies benefit from policies such as export zones, tax breaks and favourable investment laws, which are often brought about through corporate lobbying – on the flip side, business can potentially also use their leverage to address laws that restrict civic freedoms and an enabling environment for human rights defenders.
- Leadership: companies can show leadership through establishing policy commitments to respect human rights defenders. It was noted that Adidas has set a bar in this regard by having policy specifically on this issue, and other companies can also help lead.
- Partnerships: Private foundations and companies can support NGOs and human rights defenders at national and grassroots levels. Support can take many forms, including provision of space, support to pro-bono legal services, support to trainings and protection programmes for human rights defenders, engagement with the UN, ILO and government, establish networks between human rights defenders and business, and publicly recognize critical voices.

4. What role for business in addressing impacts on civic space

Participants discussed the importance of distinguishing between business action in relation to impacts on human rights defenders (such as attacks on unions and killings of human rights defenders) and overall impacts of restrictive government policies on what is being described as civic space. Two different perspectives emerged:

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- Some participants argued that business should focus on managing negative impacts linked to their operations first and foremost rather than engaging in larger policy debates. A corollary was drawn to the discussion on the private sector's contribution to the SDGs, and the need for companies to ensure that they take steps to prevent and address negative human rights impacts as their main contribution to sustainable development, before starting to identify possible actions in support of selected SDGs. After all, managing negative impacts first would be a major contribution. It was also cautioned against a scenario where companies are called upon to serve as corporate advocates, even if well-intentioned.
- Other participants argued that on the ground it is difficult separate the situations relating to human rights defenders and the broader civic space. It was held that business often is heavily involved in lobbying that often has negative implications for human rights defenders (such as anti-union legislation). Corporate leverage in the service of human rights and civic freedoms protection on the other hand should not be ruled out completely. There was agreement that to the extent companies do choose to engage in larger policy debates relating to civic freedoms, they need to do so cautiously. It was noted that given the influence of business in many parts of the world also in the political sphere, silence by business when human rights defenders are targeted or repressive laws enacted, may be taken as condolence.

With regard to the role of business associations, it was noted that the topic is getting more attention. However, there is still a lot of hesitation among associations, sometimes due to low levels of awareness, but also because there have been bad examples in the past where business associations have faced punitive actions by governments due to their engagement. The general picture is that big companies have resources and good understanding of the issues, whereas business associations have varying degrees of resources and awareness and understanding.

5. Recommendations for UNWG guidance and action

Participants welcomed the UNWG's initiative and stressed that more guidance on how the UNGPs apply in relation to human rights defenders and civic freedoms would be useful. Ideas and recommendations for further efforts by the UNWG primarily centred around three aspects:

- Considerations on process and scope for UNWG guidance development
- Ideas on focus and form of UNWG guidance
- Other actions that the UNWG could undertake or support

Considerations on process and scope for UNWG guidance development

Beyond the considerations and cautions captured in sections 3 and 4 above, participants made a range of suggestions for the UNWG to take into account when exploring guidance on the issue. These included:

- Guidance development should always be pursued in a cautious and thoughtful way. A robust process will be helpful in laying a good foundation. There is a need to understand and unpack variables related to business and human rights defenders. Part of the value of the process is to unpack these issues, which differ across industries, countries and supply chain level.
- This also relates to the fact that human rights defenders do not constitute a homogenous category, as risks and challenges vary for different groups across different contexts and

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situations. UNWG guidance needs to reflect that we are talking about a wide range of impacts. As part of the process the UNWG should therefore engage with human rights defenders that are facing different types of risks, including women human rights defenders, rural defenders, and indigenous communities.

- In order to engage a wider business community on the issue, there is a need to strengthen the “business case” arguments and leverage the positive examples of companies that have been supporting human rights defenders. Guidance to business would be most effective if including both a list of “don’ts” as well as good examples.
- Guidance also needs to reflect that outlooks differ between industries and often between transnational corporations, national business and state-owned enterprises. While a minority group of leaders are open to the UNGPs and to engaging with human rights defenders, most companies are not part of the debate. Strategies for addressing laggards or companies that actively use tactics for targeting or restricting human rights defenders and freedoms will also have to be different.
- As with human rights defenders, “safe spaces” for consultation with business are helpful to get a better understanding of issues and challenges. Private discussions are needed to understand different industries and also to understand the actions that many companies take that they cannot always be open about.
- Application in sector contexts should take into account existing tools and multi-stakeholder initiatives. Instead of reinventing the wheel, it may be more fruitful use and harness existing initiatives and apply the lens of the human rights defenders issue on them.
- With regard to the role of business in relation to supporting civic freedoms, there are many lessons that can be drawn from the fields of peace-building and anti-corruption.
- It was also suggested that the current debate was not very different from the earlier debate on “weak governance zones” and the role of business, which was spurred by the Ken Saro Wiwa case in Nigeria. Lessons from that debate could also prove useful today.
- Other resources to draw from: suggestions included recommendations made by UN Special Rapporteurs; rule of law networks; and the committee to protect journalists.
- It would be useful to frame the issue in relation to the SDGs agenda and help connecting the dots between the UNGPs and the SDGs.

Other ideas on focus and form of UNWG guidance

- As alluded to above, there was general agreement that guidance should include a focus on preventing and addressing impacts on human rights defenders when a business is contributing or directly linked, as required by the UNGPs. Some participants stressed the need to adopt a broad interpretation of the implications of “respect in practice”. Also as alluded to above, in terms of whether and how to cover possible positive actions in relation to issue of civic freedoms, the messages were more mixed.
- There were pleas for simplicity and not to make the issue of guidance development too difficult. It would be useful to develop “red flags” for companies on the way in which they can impact human rights defenders. Guidance could also usefully include hypothetical situations and good practice examples.
- One suggestion was that a list of “do’s and don’ts” should include guidance on the community/worker-business relationship and that stakeholder engagement should be a key

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topic. Related to this, UNWG guidance could explain what expertise human rights defenders can bring to stakeholder engagement.

- UNWG guidance should also recognize that national standards are often not in line with international ones, and clarify that when there is a gap, companies are expected to apply the higher international standards.
- It would be important to cover the issue of access to remedy and the role of human rights defenders. A key issue is the risk of reprisals, and the guidance should seek to identify responsibilities of those in charge of grievance mechanisms, risks and good practice.

Other actions that the UNWG could undertake or support

- One suggestion was that UNWG should use its convening power to bring together global business and civil society organizations to help identifying collective action opportunities. At the same time it was cautioned that challenges differ across sectors and contexts. There is a need to engage with grassroots organizations and human rights defenders, and global responses may not work for all contexts.
- When the UNWG is making a case for action, this is important in itself. There is a sense that business actors sometimes fear that action can be counterproductive, while in fact on the ground inaction can contribute to harms. The UNWG should reiterate the need for proper stakeholder consultation as a key element of human rights due diligence – this is the same agenda as ensuring respect for human rights defenders and not a conflation of issues.
- The UNWG is also well-positioned to convene investors. The role of investors often gets lost in the current debate on human rights defenders, and this should be addressed. In this context, there is a need to also address the role of development finance institutions. The UNWG should reiterate where the threshold lies: once a defender questions a project and subsequently is subject to threats or attacks, then the investor or development finance institution should act. It could play a part in convening discussions with investors and banks around leverage and disengagement.
- The UNWG can contribute to the narrative on human rights defenders and reiterate that human rights defenders are not criminals or anti-development activists, but rather playing a key role in protecting communities. In particular, a UNWG statement in relation to high risk countries where human rights defenders are being criminalized would be a useful contribution. In light of the research that highlighted seven countries in particular as hot-spots for attacks on human rights defenders, it was suggested that a UNWG statement could have an impact. The same would be the case for the home countries of transnational corporations involved in these cases.
- The UNWG can also use the communication tool that special procedures have at their disposal in order to raise concerns about cases involving attacks on human rights defenders with both states and business.
- The UNWG can use its engagement with states around promotion of national action plans to remind of the importance of including engagement with and a focus on human rights defenders.
- The UNWG can encourage companies and business associations to issue a statement in support of human rights defenders and play a role in convening a group to develop such a statement.

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- It was noted that current efforts are primarily engaging the small group of companies that are already on board. Participants asked whether the UNWG could play a role in engaging more companies, and in particular transnational corporations from developing countries.
- It could be effective to piggyback on other initiatives, address a range of sectors, focus on the most dangerous countries, and seek to engage beyond the usual suspects.
- It would be important that the UNWG continues to coordinate and collaborate with the Special Rapporteur on human rights defenders.
- The issue of human rights defenders should be a standing item in all UNWG activities, including in the context of country visits, in order to help address the de-legitimization of human rights defenders. In the context of the annual UN Forum on Business and Human Rights, it was proposed that the opening plenary ought to have a moment of silence to honour deceased defenders. Others also agreed it would be important to raise the issue at the Forum, but reminded that the Forum audience already consists of the “converted”. Thus, the UNWG playing a role in bringing the voice of human rights defenders into other settings, such as national level dialogues, national action plan processes and for example UN Global Compact events, could have a greater impact.