HUMAN RIGHTS DEFENDERS UNDER ATTACK: THE ROLE OF BUSINESS IN PROTECTING THEIR SPACE

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INTRODUCTION

2016 was a tough year for human rights. Inequality is on the rise, intolerance is an increasingly valuable political currency, and those who stand up for human rights are silenced, side-lined and attacked. What’s more, according to the World Economic Forum, we may be entering a:

"...new era of restricted freedoms and increased governmental control [which] could undermine social, political and economic stability and increase the risk of geopolitical and social conflict”.

Human rights activists who ask questions about or confront business interests are often the most harshly silenced and most in the firing line, and thus require additional protection.

In this environment, it is not only urgently needed that human rights defenders (HRDs) and the civic freedoms they need to work are protected; it is also in the interest of all those who value vibrant open societies, equality and non-discrimination. While some companies are still lagging behind, and are continuing to contribute to human rights abuses and to the marginalisation of HRDs and the closing of civic space, others are starting to grapple with trying to ensure that their operations do not contribute to the closing of space for civil society organisations (CSOs) and HRDs.

A modest but increasing number of companies are coming to realise the value of going the extra mile, and are using their leverage to keep the ‘enabling environment’ open, not just for business, but also for the defence of rights. As the political tone becomes more aggressive, and intolerance increases, these businesses are willing to assume a more overt role as advocates for civic freedoms and non-discrimination.

The outlook for the near future seems dire. However, there is untapped potential in the role that business, in close cooperation with civil society, can play in rolling back the attack on civic freedoms and human rights.
FACING SPECIFIC RISKS: HUMAN RIGHTS DEFENDERS WHO CONFRONT BUSINESS INTERESTS

The operating environment for HRDs in many jurisdictions is dangerous and deteriorating. Attacks, restrictions and reprisals against defenders, perpetrated by both state and non-state actors, persist in countries in all regions of the world.

Those HRDs who confront business interests - be it human rights lawyers suing corporations, labour activists and unionists, land and environmental rights activists, anti-corruption activists or journalists covering those issues - are among those most at risk. As Business and Human Rights Resource Centre’s database of attacks from February 2017 shows, there were over 400 cases of attacks against human rights defenders that were confronting specific companies or sectors in 2015 and 2016. Most attacks were connected to extractive and energy industries, followed by agribusiness. In over a quarter of cases, attacks were related to companies that were headquartered in Canada, China and the USA, or to their subsidiaries.¹

Moreover, a BHRRC briefing from January 2017, focusing on Latin America, showed that from September 2013 until December 2016, BHRRC approached companies 156 times to respond to alleged abuses against HRDs, with 44 per cent of the total number of invitations we sent to companies in Latin America. Energy and mining sectors had significantly more allegations of abuses against HRDs related to them than other sectors, with 68 per cent of invitations. Of the 185 environmental defenders killed in 2015, as reported by Global Witness, 42 of those killings were related to extractive industries, 15 to hydroelectric dams, 20 to agribusiness and 15 to logging.

As reported by the United Nations (UN) Special Rapporteur on human rights defenders in 2016, the world is facing ‘a truly global crisis’ in the numbers of killings of environmental HRDs: at least half of those killed were defending their rights against business developments. Women HRDs, indigenous activists, defenders living in conflict zones and defenders of land rights and rights related to the environment are particularly vulnerable to gender and identity-specific forms of persecution and violence, rooted in existing discrimination.

The reason for such aggravated risks are manifold. As ISHR’s Madeleine Sinclair says, the “risk for defenders arises from an overall failure to see them as central for sustainable development and good business.” Problems range from a failure to incorporate the protection of those on the frontline in trade deals or business agreements, to the failure of instituting effective protection mechanisms for environmental defenders.

¹ We are not alleging that companies are responsible for incidents against defenders: we are merely stating that the HRD’s work was focused on the company or companies in question.
2016 showed that many businesses continue to view HRDs, and the question of cooperation with them, from a short-sighted perspective, rather than embracing the business case for a positive and sustainable global business environment, in which human rights, including civic freedoms, are respected and upheld.

As the below examples show, the incentive structures of many companies continue to be focused on short-term benefits, and the profit motive often prevails over other objectives, especially when governments lack the will or the institutional and legal frameworks to ensure the protection of defenders, or set the wrong incentives for companies. As BHRRC’s Annabel Short writes, current business models prioritise short-term returns for shareholders, which inhibits companies from fully respecting human rights throughout their operations.

Impunity for killings of and attacks on defenders, power imbalances between companies, states and defenders, corruption and the lack of transparency are other root causes that lead to attacks on defenders.2

To illustrate how these drivers and enablers of business action negatively impact on civic freedoms and HRDs, we provide some examples in the first section of this article.3

However, companies have other options. In the second section of this article, we share examples of positive contributions by business to help understand the business case for protecting HRDs, and the common ground for joint action between the private sector and civil society.

Recent legal and policy developments, such as the UK Modern Slavery Act, the 2016 UN Human Rights Council Resolution on economic, social and cultural rights defenders, the latest report by the UN Special Rapporteur on HRDs, the statement by the UN High Commissioner for Human Rights to the World Economic Forum 2017 and the 2017 World Economic Forum’s Global Risks Report all either stress the role of business in protecting civic space and HRDs, or are increasingly pushing companies to pay closer attention to their association with attacks.

Acting in line with the UN Guiding Principles on Business and Human Rights (UNGPs) is increasingly:

“...interpreted to ensure that corporations do not restrict, impair or otherwise interfere with the legitimate work of human rights defenders, including the rights to freedom of expression, association and assembly.”
Combined with the heightened attention given by investors to a company’s engagement with and protection of defenders, and with a growing appreciation by businesses of the contribution of HRDs and open civic spaces to sustainable business operations, it is becoming more and more obvious to many businesses that the protection of HRDs and civic freedoms is as much in their interest as it is in the interest of defenders and citizens.

**TOWARDS A CHANGE OF MINDSET AMONG BUSINESS IN SEEING HUMAN RIGHTS DEFENDERS AND CIVIC FREEDOMS**

At the moment, many businesses continue to see HRDs and civic freedoms from a critical point of view: as a hindrance to having a good relationship with states and other businesses, and as obstacles to investments in natural resource extraction in particular. They may also see the shrinking of civic freedoms as an opportunity to sell more of their products or to produce them more cheaply. The stance of a growing number of companies, however, is to see civic freedoms as a key component of a positive business environment, wherever they operate, and to treat HRDs as partners, essential to doing business in line with UNGPs and for achieving their Sustainable Development Goals (SDGs) targets.

1. **RELATIONSHIPS WITH STATES**

While some companies actively push governments to improve the situation of civic freedoms, others actively assist, or turn a blind eye to, the criminalisation and stigmatisation of defenders. Pavel Sulzandziga, member of the UN Working Group on Business and Human Rights, has showed how various Russian companies were asked by the government to lay charges against defenders in several cases, including the cases of Sergei Nikiforov, Shaman Kechimov and the Dylacha community. In one of these cases, Sergei Nikiforov, an Evenk indigenous people’s leader, was sentenced by a court in Russia to four years in prison and a fine for bribery and fraud in 2016. Sergei was leading his village’s protests against the alleged negative impacts of the operations of a UK-registered gold mining company, Petropavlovsk, which reportedly intends to extract ore from Evenk ancestral territories. The charges against Sergei were brought by the engineering company DalTeploEnergo and relate to a building project that he commissioned from the firm in 2012. According to the villagers, however, the true reason for his imprisonment was that he had led his village’s protests against Petropavlovsk’s operations and that he called the Amur Evenki to boycott Putin’s elections in 2012.

In some cases, companies will even directly encourage governments to further supress civic freedoms. In 2016, the former Sierra Leone Country Director of Socfin Agricultural Company Limited accused civil society of destroying the country and of stifling investment.4

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4 Gerben Haringsma, in his letter of resignation, stated that he was extremely angry because of CSOs’ allegations that his company was engaged in land grabbing, slavery and forced labour. Among other things, he said that “NGOs are destroying this country. No serious investor in the agribusiness sector will come to Sierra Leone again.” A coalition of CSOs called on Socfin to disassociate itself from its former country director’s statement, insisting that the statement was not only a direct attack on CSOs, but a deliberate incitement of the government against CSOs and affected communities.
Cases like these show that some companies continue to cooperate with, or even encourage, repressive governments to suppress civic freedoms for various reasons, ranging from a perception of self-interest, to a desire not to jeopardise the relationship they have with a government on which they depend for licences and contracts.

Civil society can call on shareholders within those companies to use their power as owners of companies to raise human rights concerns. Other tools can include lobbying directors, parent companies, investors, and companies’ home governments, mapping corporate structures and understanding the motivations of companies in each specific scenario. CSOs can also scrutinise company’s responses to allegations through the Company Response Mechanism, which can lead to a publicly recorded discussion between a CSO and a company, and can push states to consult HRDs in the development of their National Action Plans on implementing the UNGPs, to ensure that these plans include protections for defenders.

### 2. BUSINESS RELATIONSHIPS

Many companies are increasingly concerned about crackdowns on protesters who demand better labour conditions, and are willing to stand up for them or even to testify in court when activists are arbitrarily detained for uncovering abuses in supply chains.

However, other suppliers and international brands are turning a blind eye to crackdowns by police and security forces on protests, particularly against labour unions and labour rights CSOs. One explanation for this may be the suppliers’ fear of jeopardising relationships with their buyers. According to Auret van Heerden of the Stern Center for Business and Human Rights:

> “...garment factories typically operate on short-term contracts. If a factory owner decided to unilaterally raise pay, [they] risk losing future business. A buyer might react by sourcing elsewhere in the country or finding cheaper labour abroad. A lot of the suppliers, privately, are accusing buyers, brands, of being part of the problem because they’re cutting their prices and expecting [suppliers] to absorb more costs.”

International brands, on their part, may turn a blind eye to crackdowns because they may consider themselves unable to ensure that workers throughout their supply chains are paid a living wage while also making products at a competitive price. They may also be wary of engaging in joint due diligence efforts with other companies to ensure suppliers are upholding responsible business conduct practices, for fear of such actions being considered secondary boycotts under competition law.

A prominent case of deteriorating crackdown on labour activists in 2016 took place in June in Nicaragua, when riot police stormed a peaceful protest outside the South Korean-owned Tecnotex factory in Managua. Workers were protesting against the dismissal of two union leaders and about factory conditions. Tecnotex called the police, who arbitrarily and indiscriminately detained a dozen workers, including workers from other factories who had gathered peacefully. In December 2016, they were found guilty on a range of charges.
Another important example is Myanmar, which has become a popular sourcing destination for the garment industry in the last years. As recent analysis shows, conditions for workers in this industry are not acceptable. The 2012 Labour Organization Law effectively put up barriers against joining and forming unions and engaging in collective actions. Workers are often dismissed for joining unions.

These and other examples show that competitive advantage is still too often pursued through downward pressure on labour costs, which pushes costs and risks onto workers, and increasingly through crackdown on unions, workers and labour leaders when they oppose such practices. Some suppliers might be doing nothing to oppose, or may encourage, increasingly aggressive crackdown by government or private security companies. The role of international brands is critical. Particularly in the case of consumer-facing industries, CSOs should highlight to a company the market and reputational risks to which it might be exposed if consumers become widely aware of supply chain issues, including in relation to crackdown on HRDs. More supply chain transparency is critical in this regard. When a crackdown is nationwide, such as in the context of protests for a higher minimum wage, it can also be useful for CSOs to encourage various brands to act as a group and speak out against it, which some have successfully done in the recent past.

3. BUSINESS MODELS BUILT ON SHRINKING OF CIVIC FREEDOMS

Some businesses see shrinking of civic freedoms as an opportunity to sell products and services which enable this shrinking. One of the key examples in 2016 was highlighted in a report on Endace, a company headquartered in New Zealand which has played an integral role in global mass surveillance. Endace’s customers apparently include government agencies in Australia, Canada and Israel, as well as the UK spy agency (GCHQ) and the Moroccan spy agency, which has been implicated in serious human rights abuses. The records of Endace sales are confirmed by internal GCHQ documents.

A less recent, but still prominent case, was highlighted by the Privacy International et al. vs. Gamma International complaint. CSOs filed a complaint to the UK National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises that alleged that Gamma had supplied a spyware product to the government of Bahrain, which had used it to target pro-democracy activists.5

To avoid such cases in the future, companies that produce products and services that may be used for surveillance ought to put in place due diligence processes to ensure they are not doing business with repressive governments, where HRDs and civic freedoms are routinely violated. They should also put in place and cooperate with remedy processes used by victims when their products are misused.

5 In its final statement, while not being able to verify the allegation that Gamma is linked to abuses through a supply to Bahrain, the UK NCP criticised Gamma for failing to put in place a due diligence process, and recommended that the company cooperate with official remedy processes used by victims wherever it identifies that its products may have been misused. Since the ruling, Privacy International noted that new information shows Gamma did supply Bahraini government at the time of the 2011 unrest.
Investors should take more account of the value of not defending civic freedoms: for example, it is estimated that the cloud-based computing industry may have lost up to US$35 billion by 2016, after the revelations that the US National Security Agency was tapping cloud-based information, which led to foreign customers shunning US companies.

4. INVESTMENT IN NATURAL RESOURCE EXTRACTION
A 2016 report by the UN Special Rapporteur on Human Rights Defenders highlighted that environmental and land defenders are the most under threat. The Special Rapporteur notes that:

“...communities protesting against projects that threaten their very livelihood and existence have often faced stigmatization and attacks from States and corporations, labelling them ‘anti-development’. Yet, these defenders often seek to preserve natural resources and to ensure a holistic and long-term approach of development where land, water, air and forests are not reduced to mere marketable goods.”

The most notorious murder of an environmental activist in 2016 was that of Berta Cáceres, the general coordinator of the Council of Popular and Indigenous Organizations of Honduras (COPINH), an organisation of Lenca indigenous communities in Honduras, who was discredited, threatened and ultimately killed for fighting the Agua Zarca hydroelectric project, carried out by Desarrollos Energéticos Sociedad Anónima (DESA), financed by the Dutch Development Bank (FMO) and FinnFund. In November 2016, 33 CSOs called on FMO to adopt measures to prevent and address reprisals against defenders. In a BHRRC-invited response, FMO answered that it was seriously considering the recommendations made by them, in relation to its Sustainability Policy and its participation in the Dutch International corporate social responsibility covenant for the banking sector.

While most common in Latin America, such attacks are not limited to the region. In March 2016, a prominent South African anti-mining activist, Sikhosiphi Bazooka Rhadebe, was killed, after almost a year of threats and attacks. His killing resulted in outrage by CSOs worldwide. For a decade, his organisation has led their community in resisting attempts by Australian-owned mining company MRC and its local subsidiary TEM to access the titanium-rich Xolobeni coastal dunes. Meanwhile in the Philippines, a growing culture of impunity took the lives of numerous HRDs, including Gloria Capitan, anti-coal community leader of Kilusan Para sa Pambansang Demokrasya-Bataan, who was shot in July 2016. She was leading the struggle against an open coal storage and stockpile in her community.

The harassment and killings of Berta, Bazooka and Gloria are not isolated cases. Hundreds of HRDs were murdered in recent years for attempting to exercise their right to give or withhold free, prior and informed consent to natural resource projects affecting them and for confronting the interests of companies and the implementation of the economic policies of states.

Businesses may engage in such behaviour to try to stabilise the operating environment by force, and be motivated by a perception that criticism will harm
rather than help implement a more sustainable long-term project. HRDs also allege that investors sometimes pressure companies to continue with projects, despite opposition by communities, which can lead to an escalation of violence. Apart from demands for improved consultation processes with communities, zero tolerance of killings and an end to impunity, some of the less common ways which can lead to improvements can include CSOs reminding businesses of the cost of conflict with communities and partnering with business leaders to speak out for defenders in high-risk sectors.

**HOW TO RESPOND? THE BUSINESS CASE FOR PROTECTING DEFENDERS FOR INDIVIDUAL COMPANIES**

For HRDs to be able to work safely, including on business and human rights issues, both states and businesses must contribute to a safe and enabling environment for such work, while desisting from making or sanctioning any actions that might restrict or threaten that environment.

Under international law, the state is the main duty bearer regarding the protection of human rights. As such, the state is obliged to support, engage with and protect HRDs. This obligation is elucidated in both the UNGPs and the UN Declaration on Human Rights Defenders. The UNGPs reinforce the state’s duty to protect by articulating how existing international law should be applied in the realm of business and human rights. Given the increasing prevalence of private corporations involved in violations against HRDs, it is thus crucial that states adopt laws and policies that enforce their specific obligations to protect the rights of defenders. The process underway in many jurisdictions to develop National Action Plans on business and human rights can be a useful entry point for that.

That said, business can and should play its part in protecting defenders.

First, companies must respect the rights of HRDs and other civil society actors to express their views on business activities, and to express dissent, protest and organise against them. The business responsibility to respect extends to refraining from harming HRDs, restricting their rights, or interfering with their legitimate activities, and consulting and engaging with defenders to identify, mitigate and remedy the adverse human rights impacts of business operations. It also includes ensuring that private security firms or contractors acting for or on behalf of business are not involved in threats or attacks against HRDs.

In addition to their responsibility under the UNGPs to respect human rights and HRDs, good business practice suggests that corporations should not only refrain from targeting defenders, but also seek to empower and support them.

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6 A 2014 Harvard study on ‘Costs of Company-Community Conflict in the Extractive Sector’ showed that a “major, world-class mining project will suffer costs of roughly US$20 million per week of delayed production” in case of conflicts with communities.

7 As was the case with Rafael Marques in Angola, also discussed further below.
For example, HRDs can assist companies in navigating human rights laws and establishing risk management procedures, setting the foundation for an operation’s long-term security and effectiveness. Engaging with defenders helps businesses prevent and mitigate negative human rights impacts, build relationships with local stakeholders and design effective grievance mechanisms, proactive mitigation strategies and remediation processes.

This approach can also reduce costs and operational obstacles by minimising the risk of community conflict, as mentioned above, which often results in interrupted production, security costs and the costs of human resources lost to crisis management and litigation. Financial markets and consumers tend to reward businesses and brands that proactively and effectively manage social, environmental and governance risks.

As ISHR’s Sarah Brooks said in a 2017 piece on OpenDemocracy:

“…whether their work is focused on labour conditions, transparency, corruption - or whether it has nothing at all to do with the operations of a particular company - human rights defenders are canaries in the coalmine, pointing to when governance failures become real risks - financial, legal, and reputational - to international brands.”

There is therefore not only a growing expectation, but also a growing understanding of the business case for a joint front of progressive businesses, civil society and states to respond to closing civic space.

GROWING SENSITIVITY TO HUMAN RIGHTS ABUSES BY INVESTORS AND OTHER BUSINESS STAKEHOLDERS

As human rights abuses become more and more visible to a range of business stakeholders - employees, shareholders, investors, customers, consumers, local communities and CSOs - so the failure to respect human rights has increasingly damaging impacts on businesses.

Related to that, and consistent with the path sketched by the SDGs, a successful model of sustainable development must benefit all of society, and not just governments and business. Investments and business operations will be more accepted, and given a social licence to operate, where human rights, and those defending them, are protected. Investors are growing more aware of the legal, reputational and other financial risks of not considering human rights issues in their investment decisions. Important initiatives, such as the Corporate Human Rights Benchmark and Know the Chain, as well as Behind the Brands, are making it easier for them to do so. This makes it increasingly possible for investors to choose their potential portfolio companies based on their human rights performance. One of the indicators in these initiatives is the companies’ commitment to respect the rights of HRDs.
THE BROADER BUSINESS CASE FOR PROTECTING HUMAN RIGHTS DEFENDERS AND CIVIC FREEDOMS

Beyond the individual business case for respecting defenders, there is also a broader case for protecting HRDs and civic freedoms by taking action to address closing civic space.

To start, HRDs monitor compliance with human rights and report on the conduct of public institutions and private organisations, and thus contribute to a culture of transparency and accountability, which in turn reduces business risk.

Further, business thrives in open societies and open civic space. Among the first victims of the closing of civic space are critical thought, creativity and innovation. These values are crucial for business, so companies lose out too.

Third, and critically, businesses need functioning markets and the rule of law to thrive. Where states fail to protect HRDs and space for civil society, but on the contrary attack, restrict and stifle them, the rule of law is often weakened.

EMERGING PRACTICE

Some significant breakthroughs happened in 2016. In July, Adidas was the first company to release a policy statement on HRDs, and could be seen to be clearly leading the pack, creating a company-wide commitment to speak out in defence of fundamental freedoms. It takes a lot for a business to get in front, but as we see time and again, setting the bar has consumer appeal, and can drive a race to the top. In line with their policy, when two labour rights activists were detained in Viet Nam in 2016 after meeting with recently laid-off workers from an Adidas supplier, Adidas wrote to the government to make them aware that they were following the case and that the workers had genuine grievances and the HRDs were acting lawfully and peacefully.

Also in 2016, a former buyer of Natural Fruit, S Group, lobbied the European Parliament in favour of an activist, Andy Hall, and in an unprecedented move testified in his favour against their former supplier in Thai courts.

Among many other examples, it is worth recalling the significant case in 2015, when three jewellery companies, Tiffany & Co., Brilliant Earth and Leber Jeweler, released statements calling on Angola to drop charges against Rafael Marques, a journalist on trial for defamation after exposing abuses in the diamond industry. Their intervention may have been one of the reasons for the imposition of a less harsh sentence. In another example, in 2014, major apparel companies...
sourcing from Cambodia condemned the government for its violent crackdown on striking garment workers that resulted in deaths and injuries. This helped bring an end to the violence.

A further recent illustration of this trend, which is very relevant, given the particularly important role tech companies play in the protection of privacy and civic freedoms, is the public resistance of tech companies to the proposed US Muslim registry at the end of 2016 and the strong reactions of several tech companies to President Trump’s immigration executive orders in January 2017. The companies criticised the seven-country immigration ban and outlined plans to support the employees it affects.

WHAT NEXT: COMMON GROUND FOR JOINT ACTION BETWEEN THE PRIVATE SECTOR AND CIVIL SOCIETY

While the increasingly clear business case is more and more understood by business leaders, and emerging practice shows many positive examples of collaboration by HRDs and companies to defend civic space, three interconnected elements require further thought, investment and nurturing.

Firstly, transparency in the development, funding and operations of projects in environments where space for civil society is closed or closing is critical. This would allow HRDs to engage early on with companies, and help to prevent many of the violations traditionally associated with such projects and contexts. The database of attacks on defenders working for corporate accountability that BHRRC released in February 2017 will be an important tool to help foster greater transparency. The downloadable database records instances of attacks against HRDs working on business-related issues, and highlights the companies that are directly or indirectly related to the incidents.

Secondly, mutual trust among business and civil society actors is a critical ingredient if we want to create the new alliances outlined in this article. Creating a space for informal, trusted exchange among like-minded companies, civil society and HRDs is critical for that, as is a change in mindset among all involved. ISHR and BHRRC are involved in efforts to create such spaces. This includes providing support to and nurturing a network of companies interested in safe environments for HRDs and business, with a view of developing concrete actions in that regard. We are also engaged in collaborative efforts around the UN Forum on Business and Human Rights on this issue.

Finally, further concrete cases of collaboration among civil society and business to defend civic space will be instrumental in deepening the ‘proof of concept.’ The documentation of such collaboration, both publicly and
informally, will enable different actors to learn across industries and contexts about successful action, improve their working methods, and come together in coalitions to limit potential negative exposure. An important tool highlighting such collaboration, through interviews and articles, is the dedicated portal on the BHRRC website, launched in February 2017, which offers a multilingual hub of information and resources on this subject, for both companies and HRDs.