

**Summary of the March 7, 2018 Ryerson University Institute Study of CSR session on Human Rights Defenders: Recent Developments**

By Dr. Kernaghan Webb<sup>1</sup>

Dr. Kernaghan Webb (Associate Professor of Law and Business, and Director, Ryerson CSR Institute): Setting the scenes:

- This is the second in a series of multistakeholder sessions exploring the Human Rights Defender (HRD) topic, facilitated by the Ryerson University Institute for the Study of CSR, with support from Global Affairs Canada
- While much HRD activity and discussion may pertain to those aspects of society for which the private sector is of minor direct concern or involvement (e.g., HRDs commenting on electoral corruption, unequal treatment of citizens by government, misuse of public funds, negligent public administration), the focus of these sessions are situations where the private sector plays a central role (e.g., HRDs are commenting on proposed or ongoing business projects affecting or potentially affecting a community and/or the environment, or on business decisions concerning workers, or on business activities affecting religious practices).
- the hope is that the international guidance currently being developed by a number of different entities discussed in this session will be considered by Canadian stakeholders to be sufficient for Canadian purposes, but there is a possibility that Canadian supplementary guidance may be developed, on an as needed basis. These sessions could be preparatory for development of such supplementary Canadian guidance through a multistakeholder process facilitated by the Ryerson University of CSR, with support from Global Affairs Canada
- the multistakeholder CSR Centre for Excellence for the Canadian Extractive Sector, an entity established as part of the original federal CSR strategy for the Canadian extractive sector operating overseas, has already developed a number of other guidance documents that elaborate on international guidance, and the CSR Centre for Excellence is prepared to do so with respect to support for HRDs, if necessary, and if multi-sector guidance is not preferable

Robert Coleman (Director - Trade Planning, Coordination and Responsible Business Conduct, Global Affairs Canada):

- Canada has had a CSR Strategy for the Canadian extractive sector operating overseas since 2009, and has had 2 CSR Extractive Sector Counsellors over this period. As part of the Government of Canada (GoC) commitment to the Human Rights agenda, it was announced earlier this year that a new Ombudsperson – the Canadian Ombudsperson for Responsible Enterprise (CORE) -- will be established to address allegations of HR abuses arising from a Canadian company's operations abroad, focusing on the garment, mining, and oil and gas sector. The work of the Ombudsperson is to be guided by international norms such as the UN Guiding Principles on Business and Human Rights (UN GPs) and the OECD multinational enterprise guidelines (OECD MNEs). A multi-stakeholder advisory body will also be established (Advisory Body on Responsible Business Conduct), to provide advice to the government on the effective implementation and development of its laws, policies and practices related to responsible business conduct by Canadian companies operating abroad in all sectors. It will also advise the Minister of International Trade on the scope and development of the CORE's operating procedures and future direction, as appropriate. In the Trade Commissioner Service (TCS), there is strong recognition of HRD responsibilities and the need to sensitize companies to human rights expectations. Through the convening power of our diplomatic missions abroad, and with the use of a modest CSR fund, Trade Commissioners

<sup>1</sup> Any errors or omissions are those of Dr. Webb.

can bring together civil society organizations (CSOs), businesses, government officials and others to promote and explore responsible business activity.

Eric Bertram (Deputy Director -- Human Rights Division, Global Affairs Canada):

- In 2016, we were asked by the new government to come up with ideas to support HRDs, which led to the Voices at Risk (V@R) policy document, an evergreen document (e.g., more guidance will be forthcoming to address LGBT issues, women defenders of HR, and indigenous communities). V@R lays out some of the principles to guide the work of Canadian officials overseas in terms of support of HRDs. It is designed to send a signal within the Government of Canada and more broadly that this work is of central importance, building on a long tradition of support for human rights.
- In terms of how we approach HRD issues in practice, prevention is a key focus, by for example, working with businesses to encourage and develop innovative ways of leveraging their influence to strengthen the position of HRDs. Canadian missions can hold sessions where CSOs, HRDs, businesses and government officials are brought together, in this way demonstrating solidarity and support for HRDs. A second key principle is "do no harm." Sometimes GoC officials will work quietly behind the scenes to resolve an issue, in collaboration with (depending on the case) local government officials, businesses, CSOs or others. It may be necessary to escalate the response, drawing on higher level officials, and perhaps operating in a more visible way, depending on the circumstances.
- As outlined in the V@R document, HRD-supportive GoC activities might include: engaging through multilateral institutions, with local authorities, and key regional and international actors; and helping build the capacity of human rights defenders' networks.

Question: (for Eric Bertram and Robert Coleman by Jen Moore of MiningWatch Canada, MWC):

- You spoke about prevention and at MWC we are concerned about what officials in Canadian Embassies - both trade and political sections - are actually doing to ensure before they provide any support to Canadian corporations are not heightening risks or otherwise putting human rights defenders and affected communities in greater risk? For instance, do Embassy officials carry out any due diligence before they lend their public support, their contacts, their advice and their lobby efforts to companies operating in some of the most violent parts of the world, including in conditions where there is no rule of law and where there are extraordinary levels of corruption and even collusion between state armed forces with organized crime, for example: Guerrero, Mexico where the Embassy has made very public representations in support of expanding Canadian mining investment despite escalating violence and forced displacement of communities in connection with Canadian-owned mining projects in the area?

Eric Bertram (Deputy Director -- Human Rights Division, Global Affairs Canada):

- considerable analysis and discussion takes place within GoC regarding what would be the appropriate role for the GoC to take in any particular situation. Part of the point of having diplomatic missions is to have a better sense of conditions on the ground so that we can decide how best to advance Canadian interests consistent with international obligations and Canadian values and expectations. In some regions there may be violence, but this does not necessarily mean that no commercial activity is taking place. Sometimes such commercial activity can be beneficial. There are many conversations that take place including with CSOs such as Amnesty International, assisting GoC officials in developing appropriate responses.

Robert Coleman (Director - Trade Planning, Coordination and Responsible Business Conduct, Global Affairs Canada):

- We at TCS provide upfront advice to assist client firms in determining if a particular foreign market, and the risks inherent to it, is the right fit for that firm and whether they can mitigate such risks. In addition, in terms of enhanced GoC services to Canadian businesses operating overseas, TCS has something called an Integrity Declaration that firms must sign before any enhanced services such as trade advocacy would be considered. The document demonstrates that the company has thought about and mitigated their risks and that they have attested to a level of integrity and behaviour that would warrant enhanced GoC services.

Anita Ramasastary (member, UN OHCHR Working Group on Business and Human Rights, and University of Washington School of Law professor):

- the UN Working Group on Business and Human Rights (UNWG) visited Canada in June, 2017, with a final report forthcoming in June 2018. The UNWG commends the GoC regarding the announcement of the new ombudsperson and multi-stakeholder advisory group.
- The UNWG is encouraging all stakeholders to look at the UN GPs as a key document re: respect for human rights and support for HRDs in the business context.
- About six months ago, the UNWG was asked to come up with more clear guidance with respect to the role of business in respecting HRDs. UNWG discussions and visits in the past months have revealed that some businesses don't understand what role HRDs play and the linkages between HRDs and businesses, in what ways business activities can threaten HRDs, and what sort of processes could be used for addressing HRD support as part of human rights due diligence exercises
- Available information suggests that it is often not multinational firms that are directly the source of HRD problems, rather it might be a private security firm working for a multinational, or local government actors that are suppressing or threatening HRDs in business contexts, and so multinational firms need to think more strategically regarding how it is they can engage with HRDs and on HRD issues.
- The UN WG guidance now being developed is intended to clarify the role of government and business. What can states do to incentivize businesses to take the HRD issue more seriously?
- The Canadian V@R policy is taking a step in the right direction in the paragraph which states that there may be an impact on the support that Canadian missions offers to a particular business, depending on the facts of a given case.
- The UN GPs only address HRDs fleetingly (i.e., regarding due diligence where HRDs are referred to as key parties to be consulted with, and in the remedies part, in the sense that the rights of HRDs to seek remedy should not be foreclosed).
- One of the ways in which governments can assist in the HRD area is through putting in place law reforms to prevent strategic lawsuits against public participation (SLAPPs), of the type that Quebec and Ontario now have in place in Canada, and that are in place in many American states.
- Other ways include through the National Action Plans (NAPs) for the UN GPs, support through embassies and home human rights agencies, and through multistakeholder dialogues
- The International Code of Conduct for Private Security Service Providers could represent another instrument and forum for addressing HRD support.
- In terms of grievance mechanisms, beyond state-based remedies, firms need to think about whether they have processes in place to protect HRDs (e.g., confidentiality, whistleblower protections, support for HRDs when they are the subject of legal actions, using their leverage and influence)
- Responding to a question from the floor from a consultant, in some cases, governments are also shareholders or are otherwise directly involved in business activities (e.g., state-owned enterprises, or SOEs). The UNWG has issued a report on SOEs, and the state-business nexus. Ultimately, the state should lead by example.

- The UN GP is hoping to have the guidance document come out ideally around the 20<sup>th</sup> anniversary of the original UN General Assembly HRD Declaration (the fall of 2018), and will probably be published first in draft form.
- Anita would be happy to participate in another session when the guidance comes out, to explain its approach and provisions.

Bennett Freeman (Principal of Bennett Freeman Associates LLC, spearheading initiative to develop business guidance re: HRD support involving three organizations):

- There is a growing problem of a closing of the civil society space around the world, with attacks on HRDs and other activists and NGOs, in authoritarian countries and in countries that are democracies.
- What is the reasonable scope of action for companies on this issue, consistent with business interest and reflecting a sense of responsibility?
- This has led to a new business network involving the Business and Human Rights Resource Centre (BHRCC), the International Service for Human Rights (ISHR), and the B-team (grouping of former political and corporate leaders who have pledged to work on sustainability issues)
- On behalf of these three organizations, Bennett has been asked last summer to put together an HRD guidance document. Since then, Bennett has conducted more than 70 interviews with key stakeholders. These interviews have been a rich and invaluable base of information for development of the guidance. The document will clarify the moral case as well as the business case for HRD support by the private sector.
- The guidance is meant to complement the guidance being articulated by others, such as that of the UN WG which is forthcoming.
- The guidance will speak of the closing of the shared space between business and civil society, and the fact that both business and civil society share a respect for human rights, freedom of expression, of assembly, and of association. In effect, the elements that enable civil society to function on human rights issues through the rule of law are not dissimilar from the elements that enable business to do business effectively and efficiently. This shared space is not sufficiently understood or recognized. The guidance document will stake out this shared space between business and civil society.
- The starting point isn't just that firms can and must act. Companies have a range of interests, involving balancing and tradeoffs in certain circumstances. There are some risks that companies face, including in relation to host governments around the world. There is a belief by some that taking a stance re: unions or NGOs could put a company at some sort of risk relative to the host government.
- The guidance document will acknowledge these risks of action, points out the range of risks, tries to put them in perspective, but also fleshes out the risks of inaction, which may be as or more challenging than managing risks of action.
- The guidance document will lay out a decision making framework for analyzing whether and how companies should act, carefully considering the firm's situation, what business engagement in that country looks like, the nature of host governments, and will lay out a road map to determine whether to act.
- There needs to be a high degree of tactical flexibility regarding how to act: sometimes companies will want to communicate their support quietly, in others to speak out publicly, or through multistakeholder initiatives (e.g., the Fair Labor Association, the digital Global Network Initiative, or the Extractive Industries Transparency Initiative). These initiatives can act as a sort of platform for the sector to address these issues.

- The document will also set out very short snapshots regarding how companies are acting in different country contexts and with respect to different human rights issues.
- The document will also look at the potential role of investors and CEOs in addressing HRD issues.
- It is expected that the document will be published in May-June of this year.
- Bennett would be happy to participate in another session when the guidance comes out, to walk through its approach and provisions.

Lisa Gou (Senior researcher and analyst, David Suzuki Foundation):

- The David Suzuki Foundation (DSF) works on domestic issues relating to protecting nature and the environment. I am here to share the perspective that protecting HRDs relates to a growing movement for legal recognition of environmental rights (ERs). ERs as defined here include the fundamental human right to a healthy environment, the idea that human health, well being, and dignity depend on access to clean air and water, clean food, healthy ecosystems and a stable climate.
- ERs are the fastest growing body of rights internationally. The UN OHCHR appointed a Special Rapporteur on the Environment and HR. The Rapporteur has identified both substantive ER HR rights procedural ER HR rights.
- The majority of 160 countries formally recognize ERs in their laws, many in constitutional laws (not Canada).
- The V@R policy may mark the first formal Canadian recognition of ERs. Canadian efforts to protect environmental rights defenders (ERDs) on the international stage would surely benefit if Canada were to formally recognize the human right to a healthy environment in domestic law.
- at the UN level, Canada is concurrently supporting a global environmental pact that is premised on the human right to a healthy environment.
- last year, the House of Commons Standing Committee on Environment and Sustainable Development completed a review of the Canadian Environmental Protection Act, and tabled recommendations including amendments to explicitly recognize a right to a healthy environment. DSF is calling for a separate Bill for a human right to a healthy environment as an orienting principle and with enforceable provisions.
- as a practical matter, protecting ER in Canada is ultimately about environmental justice (environmental health equity). The disadvantaged and vulnerable are disproportionately impacted by pollution and other environmental health hazards.
- At a recent DSF conference, one of the speakers, Vanessa Gray of Aamjiwnaang First Nation in Sarnia, Ontario's chemical valley, spoke about her experience defending her community's right to a healthy environment. She indicated that she feels unsafe when she speaks out against industrial pollution in her community. This is perhaps a topic for another session. For now, I'll just make the point that formally recognizing an environmental right to healthy environment in Canadian law could provide a framework for protecting HRDs here at home which would parallel some of the international initiatives we've heard about today.

Geneviève Paul (Acting Director General, Amnesty International Canada - Francophone Section)

- documentation shows that the risks of harassment and killing of HRDs are particularly high in extractive sector contexts, and therefore it is highly relevant that this be a focus of attention of GoC in its V@R policy.
- my points revolve around five key ideas: Champion, Meaningful, Clarity, Consistency and Equality, which I will now discuss.

- Champion - guidelines need to be directly and publicly endorsed by Ministers Champagne, Freeland, and Carr, and in the same way we would ask firms to have HRD policies, with senior executives endorsing those policies.
- Meaningful – the making of HRD supportive processes should directly involve HRDs and grass roots organizations so that they are meaningful to them: what sort of dialogue is going on right now with such groups and what sort of direct or indirect funding is being provided to these groups? What sort of awareness is there by HRDs of the V@R guidelines?
- Clarity – there is a need to understand what “support” means at a practical level. Clarity is needed regarding what the GoC is doing in situations where Canada also has economic interests, and in situations where urgent rapid response is needed. What is Canada’s role when the activities of HRDs are being criminalized, especially in Latin America where Canadian extractive firms are present. What can Canadian governments do? What sort of precautionary measures to protect HRDs are being taken where Canadian businesses are operating? The narrative around HRDs needs to be changed and Canadian officials should not contribute to the negative and dangerous narrative host countries use. For example, in Ecuador, I know from professional experience that the Canadian embassy presented HRDs as “disturbers” in situations where those HRDs were also being criticized by local governments.
- Consistency – there needs to be better HRD training done across the bureaucracy in order, for example, to ensure consistency in responses between political advisors and trade commissioners in Embassies. The GoC should ensure that through all of its activities (including those of Expert Development Canada) the GoC is not contributing or causing in anyway harm as per the UN Guiding Principles that Canada has endorsed.
- Equality - we fear that HRDs involved in cases where Canada has economic interests might receive different treatment from other HRDs receiving GoC support. If defenders need protection the issue should be addressed as a priority instead of sending them to the CSR Extractive Sector Counsellor, a mechanism for which civil society and communities have no trust. In such cases, referring them to a dispute resolution mechanism (who has not demonstrated its ability to effectively protect HRDs and bring prevention or remedy) could pose a risk to HRDs and put them in a situation of greater danger. In countries where Canada is heavily invested and where HRDs continue to be harassed and killed (such as Colombia), the first priority should be to make sure there is trust (a safe space) and that if needed HRDs can seek protection from the Canadian Government.
- Finally, to ensure effective implementation of V@R there needs to be broader reforms:
  1. It is important that the newly created ombudsperson is operating in an effective and independent manner and is capable of carrying out effective investigations.
  2. There is a need to work on policy coherence. For example, there is the V@R policy document as a statement of support for HRDs, but then in trade agreements such as the Canada-Colombia free trade agreement, the reporting framework on human rights lacks a binding dimension and has failed to assess some of the most significant trade-related human rights concerns in Colombia.
  3. There is a need to look at the role of Canada as a home state, adopting policies and legal measures to prevent harm by embedding HR due diligence into law like France has done. Access to justice for victims should be improved and barriers should be lifted. There are already numerous recommendations in terms of facilitating access to justice at both the civil and criminal level formulated by the United Nations Office of the High Commissioner for Human Rights that Canada could implement.



David Clarry (representing the Mining Association of Canada--MAC, David is also the Vice President of CSR at HudBay Minerals, but is speaking on behalf of MAC)

- MAC is the national voice of the Canadian mining industry. Working alongside its members, MAC promotes the industry nationally and internationally, works with governments on policies affecting the sector and educates the public on the value mining brings to the economy and the daily life of Canadians.
- In response to tailings failures in the late 1990s, a decision was made by the MAC board to develop an initiative to respond to societal expectations and to improve the industry's environmental and social performance. This was the origin of MAC's Toward Sustainable Mining (TSM) program, which has become a central part of MAC's work. It was established as a requirement of membership for Canadian operations in 2005 and in the last few years, it has been adopted internationally by mining associations in Finland, Argentina, Botswana, the Philippines and Spain. It has also been or is being implemented by several MAC members with international operations including Agnico Eagle, First Quantum, IAMGOLD, Hudbay, Goldcorp and ArcelorMittal outside of Canada.
- Mining is a significant economic activity. MAC has collected member data indicating that 80% of money spent by a mine is spent in the host countries with the largest portion going to suppliers and employees within those countries. In the context of the right to make a living, jobs are important: jobs are some of many benefits associated with mining activity, but this having been said, firms should not infringe on other rights. Mining should be responsibly undertaken.
- A feature of the TSM program : progress is measured, reported and externally verified at the facility level, driving facility level performance, compared against protocols, and then aggregated to compare against the sector as a whole.
- TSM addresses the environmental aspects of mining, tailings management, community engagement, energy consumption and greenhouse gases.
- TSM has caught the attention of supply chain users of metals such as Apple and the Responsible Business Alliance, a US based manufacturers association focused on driving a responsible supply chain for metals and minerals, who are engaged with MAC to look at how TSM can play a role in achieving this.
- one of the key distinctive structures of TSM is a community of interest advisory panel (COIP), with representatives of labour, environmental groups, faith based organizations, communities, indigenous interests, and the financial community. The COIP is given complete freedom to express itself on what it thinks of TSM: they publish a statement every year in the TSM Progress Report. The COIP creates a discipline for MAC to be accountable to and provides independent oversight of TSM. Each of the countries that is now adopting TSM has to establish its own COIP as a requirement of the licensing agreement.
- links to HRs: It's in MAC's members' interest to at least defend HRDs ,if not put ourselves in the position of being HRDs. Communities are not homogenous. Some members will be focusing on one right, others focusing on other concerns. A company can be operating in a community in a divisive way or in an integrative way.
  - it's in MAC members' interests to try and reduce conflict and if we pursue that course we are providing some level of defence to HRDs because we are supporting the legitimacy of the right to disagree and to be heard
  - the initial reaction of a mining company may be "somebody said this or that and is trying to stop the project", but they may be actually raising an issue that needs to be addressed. MAC supports the legitimacy of people coming forward to voice an alternative view on an issue. A space needs to be made for that voice to be heard and considered, and by supporting the legitimacy of that need companies can help reduce the risk for those who speak-up for rights.