

E-PAPER

Supporting civil society under pressure – lessons from natural resource exploitation

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published by Heinrich Böll Foundation, June 2017

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Introduction^[1]

The killing of Berta Cáceres in Honduras on 3 March 2016 drew worldwide attention to the risks faced by communities that want to have a voice in decision-making in natural resource governance. Cáceres was the co-founder and coordinator of the Council of Popular and Indigenous Organizations of Honduras (COPINH). She led a grassroots campaign against the Agua Zarca dam that was to be built in the Gualcarque river, which is used by the indigenous Lenca people for fishing and also has spiritual value. The Lenca community was never officially consulted during the set up of the project. Instead, they organized their own local assembly in which they voted against the dam. Their joint voice was not respected but met with severe threats and intimidation.

Berta Cáceres' death is thus only one part of the story. The concept of «shrinking space» has been put forward to capture more fully the wide range of pressures and restrictions experienced by civil society.^[2] These pressures include physical harassment, as well as initiation of criminal investigations, surveillance, defamation, burdensome registration requirements for non-governmental organizations (NGOs), stricter regulation of foreign funding for NGOs, restriction of demonstrations, and the more general exclusion of civil society.

A caveat is needed when speaking about «shrinking» space. In many countries, post-dictatorship society has actually led to more space for the vast majority of civil society. A more active participation by civil society can actually be the reason for increased pressures to silence unwelcome voices. Also the attention to the topic may have led to more documentation of restrictions on civil society. Patterns in pressures on civil society are, therefore, most usefully analyzed within a particular context.^[3] Relevant questions in relation to civic space are: who is put under pressure, when, how, and by whom. A case in point is the nexus of natural resource struggles and spaces under pressure for civil society. When affected communities attempt to influence the management of natural resources, they often experience a strong negative reaction from political and corporate actors defending their own interests. Governments sign up for a significant part of these pressures, but in conflicts about natural resource projects also the private sector plays a role. In the case of Berta Cáceres, not only military officers but also the head of security of the private company

- 1** All descriptions of individual cases contained in this paper are based on individual interviews conducted in the respective countries. References to names of individuals or organizations have deliberately been omitted.
- 2** Barbara Unmüßig, «Civil society under pressure – shrinking – closing – no space,» Heinrich Boell Foundation, May 2016, https://www.boell.de/sites/default/files/uploads/2015/12/20160601_civil_society_under_pressure_shrinking_spaces_englisch.pdf; For a recent timely critique on the de-politicized use of the term, see Ben Hayes et al, «On shrinking space,», April 2017, Transnational Institute.
- 3** Chris van der Borgh and Carolijn Terwindt, *NGOs under Pressure in Partial Democracies*, Palgrave Macmillan, 2014.

Desarrollos Energeticos SA (Desa) behind the dam have been arrested and criminal investigations are ongoing. In a further attempt to silence its critics, the company Desa filed a defamation lawsuit against activists who spoke out about the circumstances of Berta Cáceres death.

This paper is a reflection of an ongoing research project of the Heinrich Böll Foundation and the European Center for Constitutional and Human Rights, designed to uncover common patterns and dynamics of restrictions on and coping strategies adopted by civil society actors in the specific context of natural resource exploitation. It draws on case studies in India, Mexico, the Philippines, and South Africa based on desk-research and interviews with communities and organizations. After highlighting the economic context and legal framework behind the growing number of natural resource projects, the paper briefly sketches some common patterns of restrictions, as well the strengths and limits of prevalent response strategies. Current modes of response are predominantly reactive. While such emergency measures are absolutely necessary, they are not enough. The paper calls for an analysis of the relation between community exclusion from decision-making and subsequent attacks and focuses on consultation procedures, which are thought to enable public participation, but more often end up being part and parcel of the process in which civil society is excluded. Those organizing to counter such exclusion and demanding to be heard are put under pressure to remain silent.

Shrinking space and natural resource governance

There is a great demand on the world market for mineral, fossil, and agricultural resources, which leads to natural resources such as water, land, and forests being put to industrial or commercial use. How a country deals with its natural resources is not only a question of economy and ecology; it is also an issue of how citizens participate in decisions about the use of natural resources. Not surprisingly, projects involving the exploitation of natural resources elicit strong reactions from local communities and civil society. The analysis of pressures on civic space in the context of natural resource governance thus needs to take into account the global economy of raw materials, legislation on natural resource exploitation and the procedures to obtain approval for individual projects involving the use of land.

Global resource extraction grew steadily from 40 billion tons in 1980 to 55 billion tons in 2002.^[4] Europe has been and still is the main importer and consumer of traded material

4 Arno Behrens, «The material basis of the global economy: worldwide patterns of natural resource extraction and their implications for sustainable resource use policies», *Ecological Economics* (2007), p. 3.

followed by the United States.^[5] In contrast, environmental degradation and social tensions are suffered mainly by the resources-extracting countries and regions, which have to bear the negative consequences. General policies for the international economy of raw materials are set in fora such as the G20 summit that takes place in Germany this year. The G20 currently favor mega-infrastructure projects, depending on and facilitating extraction of raw materials^[6] and its Enhanced Structural Reform Agenda of September 2016 advocates for national and international regulation securing foreign investment, competition without undue restrictions, tax effectiveness for business activities, efficiency of regulatory approval processes, and investor protection. Frequently, international financial institutions such as the World Bank, regional multilateral development banks and the International Finance Corporation financially support such projects.

Resource extraction and the associated investment are fostered domestically by state governments. An example of recent legislative reform favorable to foreign investment comes from Mexico. Under the new legislation of 2014, energy development projects are a matter of public and national interest. Landowners are therefore obliged to sell their property to or negotiate agreements with the energy corporation that was granted the contract to carry out energy projects on the property.^[7]

Although the Sustainable Development Goals adopted by the UN General Assembly in September 2015 state that sustainable development involves not only economic growth, but also social inclusion and environmental protection, governments often prioritize foreign investment and resource extraction. In this regard, the former UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, warned that «[f]ree market fundamentalism – the belief in the infallibility of free market economic policies – is an urgent threat,» observing a trend of states prioritizing the freedom of the market over the freedom of human beings.^[8] In addition, in his report on freedom of peaceful assembly in the context of natural resources, he criticizes the absence of legal frameworks that clearly spell out land rights, as this «creates opportunities for arbitrary expropriation or land grabbing, which in turn can lead to conflict. Opaque procedures for granting exploitation licenses and concessions aggravate the situation and often fuel social protests.»^[9] In this regard, governmental support for the steel project by POSCO in India

- 5 United Nations Environmental Program, «Global material flows and resource productivity - assessment report for the UNEP international resource panel», 2016, pp. 56-58.
- 6 Global Infrastructure Connectivity Alliance Initiative, «Background Document», G20 Summit China, 2016, <http://www.g20.utoronto.ca/2016/global-infrastructure-connectivity-alliance.pdf>.
- 7 Tony Payan and Guadalupe Correa-Cabrera, Issue Brief, 10 October 2014, «Land ownership and use under Mexico's energy reform», Rice University's Baker Institute for public policy, p. 2.
- 8 «Fundamentalist intolerance is degrading assembly and association rights worldwide – UN expert», 17 June 2016, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20132&LangID=E#sthash.xlYTs5ge.dpuf>.
- 9 Maina Kiai, «Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association in the context of natural resource exploitation», UN-Doc. A/HRC/29/25, para. 15.

is exemplary (see Text Box 1). But even if there are specific laws protecting, for example, indigenous peoples or the environment, these are frequently disregarded. For example, the Philippine National Commission on Indigenous Peoples (NCIP) has approved projects without adequate consultation even though the mining laws explicitly foresee that no indigenous land shall be opened for mining operations without the prior consent of the indigenous community concerned.

The POSCO steel project in Odisha

In India, despite the guarantees of the Forest Rights Act, India's industrial policy provides corporations with significant support in order to rapidly carry out their projects. The Memorandum of Understanding concluded between the Government of the Indian state Odisha and South Korean investor POSCO for an integrated steel project, including a plant, a port and mining concessions, presents a paradigmatic example. The Government of Odisha promised that it will assist POSCO «in obtaining all clearances including forest and environment clearance.»

The local population affected by the planned mine only heard about the threat to their livelihood in the local news one day after the Agreement was concluded. As a result, communities organized in the anti-POSCO movement and resisted the construction of the project demanding that their concerns be taken seriously. In the ensuing dynamic, the government and the company initiated criminal and civil proceedings for trespass when community members re-entered the land that was forcefully acquired without respecting the requisite legal procedures protecting their rights as forest dwellers. In 2013, escalation led to the death of three community leaders. Police investigations concluded the men died while making a bomb, based on the statement of one pro-POSCO villager not present at the scene and despite numerous other witness testimonies to the contrary.^[10]

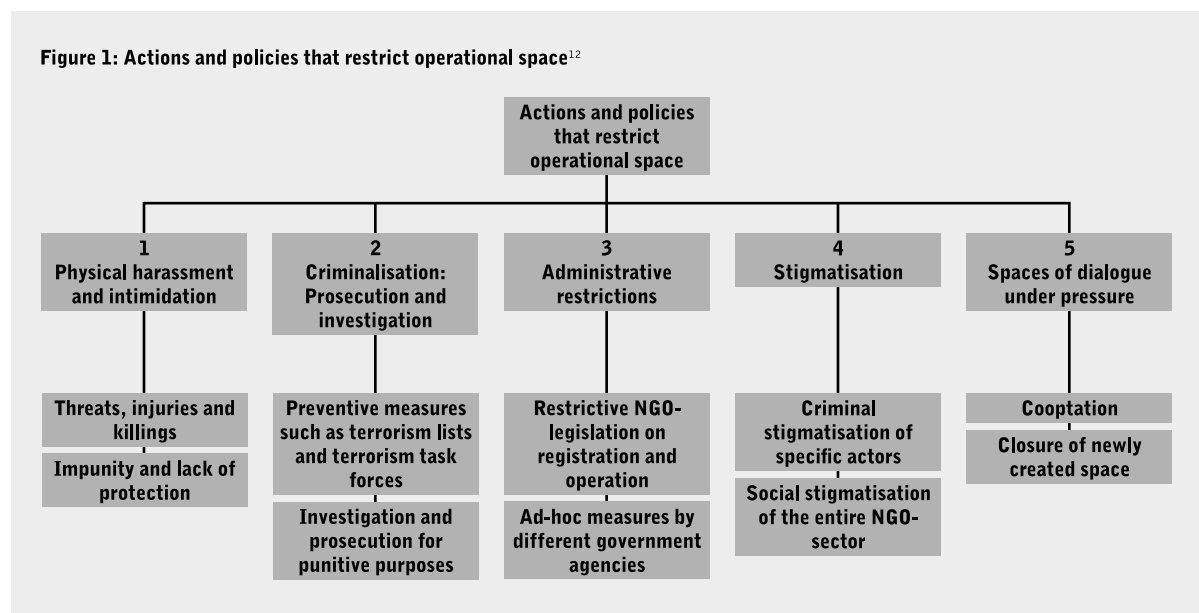
In 2017, POSCO finally declared the project to be over. Disregard for communities' land rights persists. The communal forestland expropriated for the purpose of the POSCO project has still not been returned to communities. On the contrary, Odisha's Industry Minister announced that the land would be transferred to the Odisha Industrial Infrastructure Development Corporation. Apparently, a similar project on the very same land but with a new investor, JSW Steel Limited, is already underway.^[11]

10 Samantha Balaton-Chrimes, «POSCO's Odisha project: OECD national contact point complaints and a decade of resistance», Corporate Accountability Research, 2015, p. 20.

11 Amnesty International, 5 June 2017, «Odisha Government must not ignore forest rights claims on POSCO project», <https://www.amnesty.org.in/show/news/odisha-government-must-not-ignore-forest-rights-claims-on-posco-project-sit/>; The Telegraph India, June 3, 2017, «JSW eyes POSCO land for steel project'», https://www.telegraphindia.com/1170603/jsp/frontpage/story_154903.jsp.

Pressures on communities and organizations advocating for sustainable natural resource governance

Escalation of conflicts and the various methods to silence communities are closely connected to the approval and implementation of natural resource projects. Scenarios most likely to lead to restrictive measures include first encounters during initial exploration, public hearings during environmental impact assessments, and the approval of necessary licenses for exploitation. For example, in relation to a wind park in Mexico, intimidation of community members occurred in the days after a judge suspended the project and when the community filed a claim for an injunction. As a simple overview of the range of pressures on civil society, this paper draws on an existing categorization, borrowed from van der Borgh and Terwindt, and describes how these pressures operate in the context of contestation about natural resource governance.



12 Chris van der Borgh and Carolijn Terwindt, «Shrinking operational space of NGOs – a framework of analysis», Vol. 22 Development in Practice Issue 8 (2012), p. 1070.

Physical harassment and intimidation

The 2016 report of the UN Special Rapporteur on Human Rights Defenders demonstrates that in many countries those speaking out about natural resources exploitation are at high risk of personal attacks, including killings (A/71/281). Global Witness' reports show that killings increased over the last years: 908 people were killed for their work on environment and land issues between 2002 and 2013. With 147 individuals dead, the year 2012 has seen ten times as many people killed than 10 years previously. This tendency continued and 185 killings of land rights defenders were documented in 2015.^[13] Even more prevalent are threats and other acts of intimidation. For example, farmers in the Philippines advocating for the recognition of their land rights as well as community members living near wind parks in Mexico reported intimidating text messages, phone calls as well as gun shots near their homes. While not all such threats lead to killings, only recently, in February 2017, Edwin Catog – a 44 year old indigenous farmer, actively supporting Madaum Agrarian Reform Beneficiaries (MARBAI) in their fight against Lapanday Food Cooperation for recognition of their rights to the land – was shot dead. As so often, the perpetrators were unknown assailants on a motorcycle.^[14]

Intimidation and attacks usually target community leaders or senior NGO staff. However, increasingly family members have also become targets of intimidation and attacks. In addition, lawyers supporting communities in disputes over natural resource projects are often targets of physical assault or intimidating vigilance. Generally, due to a weak state capacity in rural areas, members of community organizations are more often exposed to physical threats and intimidation than members of professional NGOs in urban areas. Also the degree of violence in physical attacks is higher in rural and remote areas where local elites retain vast powers and reporting through independent media is largely nonexistent. Such harassment can significantly weaken organizations and even lead to their closure. Women are often disproportionately faced with threats referring to their family and children. Vulnerability frequently extends beyond gender dynamics. Often, as an NGO representative in Oaxaca, Mexico, pointed out, it is about being a woman, indigenous, marginalized, and a human rights defender.

13 Global Witness, «Deadly environment – the dramatic rise in killings of environmental and land rights defenders», 2014, p. 20; Global Witness, «On dangerous ground – 2015's deadly environment: the killing and criminalization of land and environmental defenders worldwide», p. 4.

14 House Resolution No. 804 of Anakpawis Party List directing the committee on human rights to conduct and inquiry on the February 16, 2017 extra-judicial killing of Edwin Catog of February 20, 2017.

Criminalization: prosecution and investigation

Criminalization involves criminal investigation, including searching offices and seizing computers, pre-trial detention, excessively high bail figures, travel restrictions, costly lawyers, and time in prison. Fabricated or trumped-up charges are common. For example, in the Philippines, Agrarian Reform Beneficiaries faced charges for theft when they harvested land which was officially awarded to them. Another problem is the burden of such investigations and arrests, even when charges are later dismissed. The following case of protesters in the Limpopo province in South Africa is representative. The police specifically arrested those activists who led the resistance of nine villages against negative impacts of the Twickenham mine operated by Anglo American, headquartered in London. Some were kept in jail for three days, even though the cases were later dropped. Without money to pay for the bail and further funds to engage a lawyer or pay for travel costs to court, they are not able to defend themselves and may spend significant time in prison before and after a judgment is rendered. In another village in Limpopo, community members reported that finding local lawyers is almost impossible as they are all employed by the company operating the mine and thus refuse to support community members citing a conflict of interest. These cases are part of a global pattern of criminal investigations against those speaking out about negative impacts of natural resource projects.^[15]

Administrative restrictions

Another prevalent form of restricting civil society is by imposing burdensome registration requirements on organizations and placing restrictions on their foreign funding. India's Foreign Contributions Regulation Act (FCRA) is a clear example of this trend. At the end of 2016, many NGOs saw their registration cancelled for failure to apply for renewal, spontaneous re-assessment of licenses or undisclosed reasons based on field agency reports not made available to the affected organization.^[16] Organizations working on natural resource governance are among those targeted by the application of the FCRA, with the revocation of Greenpeace's registration being one prominent example. Administrative restrictions can also interfere with the freedom of assembly. For example, municipal authorities in South Africa require prior approval of demonstrations in violation of the Gatherings Act. This has affected demonstrations by community organizations calling attention to the negative con-

15 Gustavo Rojas Paez & Carolijn Terwindt (eds.), «Whose Natural Resources? Criminalization of Social Protest in a Globalizing World», Vol. 4 Oñati Socio-Legal Series No. 1, February 2014; El Observatorio para la protección de los Defensores de Derechos Humanos, «Criminalización de defensores de derechos humanos en el contexto de proyectos industriales: un fenómeno regional en América Latina», February 2016; Publish What You Pay & CIVICUS, «Against all odds – the perils of fighting for natural resource justice», 2017, pp. 18-20.

16 Human Rights Watch & Amnesty International India, «Joint Statement of 8 November 2016», <https://www.amnesty.org.in/show/entry/224643>.

sequences of mining projects in the provinces of Mpumalanga and Limpopo. In some cases, the authorities even required the mining company, the target of the protest, to confirm its willingness to receive the community's memorandum of demands in order to allow the demonstration.

Stigmatization

Government authorities and media often portray organizations and communities that resist natural resource exploitation as communists, anti-development, anti-progress, anti-nationalists or terrorists. Such stigmatization can be a precursor to criminal investigations into and arrests of community members or even military action. For example, in the Philippines, members of community-based organizations resisting mines or large-scale agricultural plantations have been portrayed as being part of the National Peoples' Army. This serves as a pretext for military attacks on those individuals. Another consequence of such labels is that non-governmental and community based organizations can lose credibility among communities and other relevant constituencies. For example, one Philippine organization, working for the defense of indigenous peoples' rights, reported that one funder withdrew financial support as a result of these labels.^[17]

Spaces of dialogue under pressure

Spaces where government agencies and civil society meet – such as social forums, round tables, and seminars – can close or disappear, or simply lead to the disappointment of participants and be experienced as «fake space.» Such dialogue can be perceived or used as a legitimizing practice, instead of an actual opportunity to give voice or to exert influence. This happens, for example, in participation procedures regarding new legislation. In those circumstances, community organizations and NGOs may therefore rather have the feeling of being «participated»^[18] while in fact being excluded from actual decision-making. A further trend is the increase of civil society organizations that are set up with government or business support (so-called GONGOS and BONGOS) and in fact aligned to government or business policies on natural resources. Critical NGOs and community-based organizations have to compete with those organizations when it comes to opportunities for civil society participation, which are generally limited in number and scope.

17 For other examples see also International Peace Observers Network, «Red-Baiting in the Philippines – civil society under general suspicion», 2012.

18 Term used by Jane Duncan, *Protest Nation*, University of KwaZulu-Natal Press, 2016, p. 44.

The business nexus of restrictions

It is widely acknowledged that companies have major impacts on human and civic rights. The growing reach and impact of business enterprises have given rise to a debate about the roles and responsibilities of the private sector with regard to human rights. This led to the endorsement of the UN Guiding Principles on Business and Human Rights in 2011 as a global standard for preventing and addressing adverse impacts on human rights linked to business activity.

Natural resource governance often involves a strong private sector involvement. There is a nexus between business, natural resource governance and the observed pressures on spaces for civil society: Companies are in direct contact with community members as they carry out natural resource projects. Their representatives also witness the restrictions faced by civil society. While there is little evidence of direct company involvement in killings of their critics, the role of business in other forms of restrictions is undeniable. Business actors have been directly involved in filing defamation lawsuits, asking the state for criminal investigation, as well as arbitrary and excessive use of private security guards against affected communities.

For example, in the Limpopo province in South Africa, a company initiated charges against community members who protested after a fellow resident was killed by a flying rock during blasting activities on a mining site located too close to residential areas. The charges were not upheld by the court but community members spent up to 11 days in prison before bail was granted. Afterwards community members largely decided to keep silent for fear of further reprisals. Also in South Africa, staff members of an environmental NGO were accused of libel by the Australian mining company Mineral Commodities Limited (MRC) claiming 1 million Rand or about 70,000 Euro compensation for statements made in a presentation at Cape Town University, a tactic the company had been engaged in previously.^[19]

Indirectly, companies have been involved in putting pressure on civil society through excessive violence by private security guards. In the Philippines, members of the MARBAI Agrarian Reform Beneficiaries Cooperative have been forcefully driven off their recently reclaimed land by private security guards and have suffered bodily injury and other assaults. The security guards acted for Lapanday Food Cooperation, which continues to maintain a claim over this land in spite of court judgments asserting the right of the MARBAI cooperative. Finally, as UN Special Rapporteur Maina Kiai pointed out, business relationships with government are frequently characterized by privileged access and treatment. This

19 Ground Up, «Australian company sues SA environmental lawyers for defamation», <http://www.groundup.org.za/article/australian-company-sues-sa-environmental-lawyers-defamation/>.

can provide companies with enormous influence in legislative processes, which can end up restricting space for civil society.^[20]

These examples illustrate that it is not uncommon for business actors to have been engaged in, contributed to or linked to restrictions faced by civil society. To date, however, corporations rarely speak out actively when critics of their projects are killed, threatened, or otherwise harassed. This is particularly problematic as business operations tend to benefit from the silencing of their opponents.

Response strategies to counter restrictions

During the past decade, civil society, governments, and international institutions have developed measures to protect community-based organizations, NGOs and their individual members against the pressures mounted against them. Such efforts include international accompaniment of people-at-risk, activities on the basis of the UN Declaration and EU Guidelines on Human Rights Defenders, and national efforts such as the Mexican governmental «panic button», which those under threat can carry with them and press in an emergency to get police assistance.^[21] The most prevalent strategies can usefully be categorized in four categories: legal support, advocacy, emergency measures, and public campaigns. These strategies all have their particular strength and justification. At the same time, a common factor is that they tend to respond to urgent needs, without addressing root causes of escalating problems.

Legal support and litigation

Organizations and their members who face criminal charges or other lawsuits need legal expertise, the assistance of paralegals, and funding to put up an effective defense. Organizations which dedicate time and money to this area of support exist, but not in sufficient numbers. Defending NGOs against administrative restrictions is equally time-consuming.

- 20** Maina Kiai, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, UN-Doc. A/70/266, paras. 86 et seq.
- 21** Recent publications have shed light on the availability, viability and effectiveness of response strategies: International Service for Human Rights, «Protecting our space – human rights defender strategies to protect civil society space», 2016; Front Line Defenders and Tactical Technology Collective, «security in a box – tools and tactics for digital security»; Front Line Defenders, «The European Union: What it can do, getting it to take action», 2012; Enrique Fernández Eguren & María Martín Quintana, «Protection of human rights defenders: best practices and lessons learnt», (2011); Inmaculada Barcia, «Urgent responses for women human rights defenders at risk: mapping and preliminary assessment», June 2011; Jane Barry & Vahida Nainar, «Insiste, persiste, resiste, existe, women human rights defenders' security strategies», 2008.

Challenging restrictive legislation on the basis of unconstitutionality needs thorough preparation and may include several court instances. Support for these types of activities has to be long-term in order to allow organizations a serious chance to challenge such laws.

Advocacy for governmental and diplomatic intervention

Civil society engages in advocacy with foreign governments, their embassies and delegations, as well as UN institutions, as they can play a crucial role in speaking out about restrictions against civil society and can support civil society actors who are at risk. The EU Delegation to South Africa, for example, has supported the Amadiba Crisis Committee, after the killing of one of their leaders in March 2016, with two consecutive emergency funds. They also raised the issue directly with the Canadian company and informed the African Commission on Human and Peoples Rights. Still, the threats and attacks on leaders of the Committee and the community at large persist. The effectiveness of such bodies depends on their leverage over the actors responsible for the pressures. Such leverage may exist over government actors such as the military. This may explain why the visit of Special Rapporteur on extrajudicial, summary or arbitrary executions Philip Alston was evaluated as an important factor in reducing extra-judicial killings in the Philippines. Often though, responsibility for threats and attacks remains opaque in particular where fellow community members or private business is involved. In such cases, an EU or UN delegation may not have the necessary leverage to achieve behavioral change.

Emergency measures against physical threats and attacks

A vast network of international and national NGOs has developed a number of highly valuable and efficient ways of protecting threatened members of civil society organizations, including protective accompaniment, temporary relocation, or security training. Some governments also provide direct protective measures, such as security guards. Many of these emergency measures are reported to work quite well, but their impact is limited due to their inbuilt focus on immediate and short-term solutions.

Public campaigns

Finally, a common strategy is to engage in (international) campaigns, including urgent appeals to UN mechanisms, calling upon governments, using the media, or highlighting the important work by specific individuals through awards. The spotlight can provide people and organizations at risk with the necessary backing to regain legitimacy. Unfortunately, such efforts are often limited to only a few cases where escalation is already underway. One staff member of a South African NGO, for example, deplored that in many cases the nati-

onal media lack interest in local struggles. This lack of interest may often be caused more by lack of resources than genuine ignorance. However, «in smaller cases media only comes when things turn edgy and violence is involved ... They are in a sense quite sensational. They do not cover peaceful protests. In the end media support is lacking for these struggles when they remain in the limits of the law.» These are dangerous dynamics that may play a role in the escalation of conflicts. Furthermore, after the killing of Berta Cáceres – despite the international recognition she enjoyed, including a Goldman environmental prize – several NGO representatives expressed doubts as to whether public attention indeed provides the requisite protective effect.

In sum, many of the existing measures focus on the emergency protection of individuals against physical harassment. This is extremely important, especially given the prevalence of intimidation and killings in the context of natural resource projects in some countries. Yet, many response strategies are short-term, ad-hoc and only serving few communities and organizations. Similarly, emergency measures seldom effectively address the impact that organizations suffer when they lose staff due to killings, criminal investigation or other forms of harassment. It takes time and resources to rebuild organizational capacity. Finally, response strategies rarely address the root causes of civil society engagement and restrictions. They do not include enough proactive and preventative support measures to break the vicious circle of recurring threats and restrictions.

As a step towards such a preventative approach, this paper draws attention to the link between community exclusion from decision-making and the range of attacks on civil society that can be observed. The next section addresses consultation procedures as a key example of this kind of community exclusion in the course of natural resource projects. Many communities have to deal with highly inadequate models of consultation, which mostly end with approval for exploitation, regardless of the community input. Inadequate consultation should be recognized as an important context in which those that organize and raise their voice are put under pressure to withdraw and remain silent.

Shrinking space for consultations about natural resource governance

«Everything starts with participation. If communities are properly consulted at the outset of a business project, then individuals may not even have to become human rights defenders. If their voice is valued, then they are much less likely to be attacked.»^[22]

22 Interview during the Business and Human Rights Forum in Geneva on 15 November 2016.

The importance of civil society participation is underlined in the 2011 Declaration of Busan for effective development cooperation that states that «civil society organizations play a vital role in enabling people to claim their rights, in promoting rights-based approaches, in shaping development policies and partnerships, and in overseeing their implementation». Also goal 16 of the Agenda for sustainable development enshrines inclusive, participatory and representative decision-making at all levels and the UN Declaration on the Right to Development emphasizes that by virtue of the right to development every human being and all peoples are entitled to participate in, contribute to and enjoy economic, social, cultural and political development.

Consultations are one of the primary tools for public participation in natural resource projects to achieve a balance between national economic policies and local visions for development. For example, public consultation procedures are part of environmental and social impact assessments to be carried out before extractive industry projects are approved and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) recognizes consultation rights for indigenous people, in recognition of historic injustices and the special relationship they maintain with their territory.

Consultation procedures spelled out in these legal standards vary in terms of their nature and objectives. Mere consultations enable the public *to voice their opinion*, while decision-making is not made dependent on the outcome of such consultation. As such, consultation can enable but does not guarantee genuine participation in decision-making about natural resource governance. UNDRIP goes further as it requires that indigenous people have the right to be consulted freely, prior to a decision, on an informed basis and *with a good faith intention to obtain their consent*^[23] whenever (business) projects affect their rights including ancestral land or their traditional way of living (FPIC – Free, Prior and Informed Consent). In some cases, such as relocation or, as the Inter-American Court of Human Rights has held, for projects that have a major impact on indigenous territories, *obtaining actual consent* is required.^[24]

A highly worrisome development is the dissatisfaction of civil society with the current models for consultation. For example, in procedures that are supposed to be based on the model of FPIC, there are often disagreements between all different stakeholders on whether consultation is sufficient or consent needed (and by whom), when the requisite of good faith negotiation is met, what happens in case consent cannot be reached, who qualifies as indigenous, who can validly represent an indigenous community, and which kind of projects actually «affect» the indigenous peoples, therefore triggering the need for consultation to obtain free, prior and informed consent. Such disagreements about the appropri-

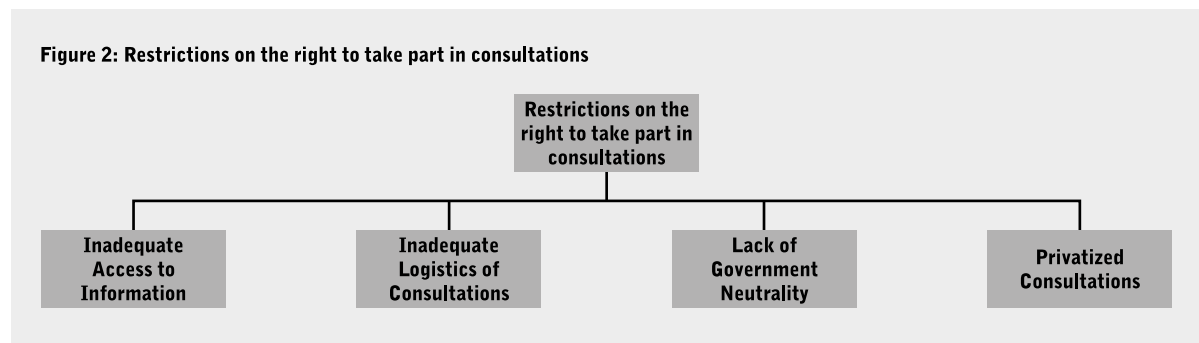
23 Also Art. 6 (2) of the ILO Convention No. 169 – Indigenous and Tribal Peoples Convention requires that consultations are undertaken in good faith with the objective of achieving agreement or consent to the proposed measures.

24 Inter-American Court of Human Rights, *Case of the Saramaka People v. Suriname*, Judgement of November 28 2007, Series C No. 172, para. 134.

ate form of consultation can easily lead to significant tensions within or between communities. And even when the rules are clear, their enforcement is not guaranteed.

Evidently, the restrictions described in the preceding sections also affect consultations. For example, in Oaxaca in Mexico, from the moment of the first assemblies to consult about a wind park, death threats were issued to community members by other community members and by unknown people. One of the observers in the civil society Observatory Mission shared that people in favor of the project would yell at him «human rights, get out of Juchitan» («*fuera derechos humanos de Juchitan*»). «We were not viewed as a neutral actor by those in favor of the project. We were seen as those opposing progress and against the creation of jobs. Some of the people present at the consultation carried guns.» Physical intimidation of members of community organizations thus impedes democratic and free participation in consultation procedures. Also, non-registration of an NGO may effectively bar it from any participation at all and initiating unfounded lawsuits against affected people may have a chilling effect on activism for fear of future reprisals.

In consultations, local communities are forced to interact, often for the first time, with government and business actors with significant power, economic interests and knowledge. Consultations must, in principle, guarantee equality of arms in this highly imbalanced set of conditions. Unfortunately, current experience shows that, on the contrary, there are very specific ways in which communities are excluded from genuine participation in consultations on natural resource projects (see Figure 2) and power imbalances are reinforced instead of leveled out.



Inadequate access to information

«The social and labor plan is secret. We also did not receive the environmental impact assessment and have not seen the permits for the mine until today»

Member of one traditional authority affected by mining in Limpopo/South Africa

«Employees of the National Commission on Water do not provide transparent, opportune or correct information. Everything is based on rumors and then projects are advancing... »

Staff member of one Mexican NGO working on land rights and dams in Oaxaca/ Mexico

Consultations only serve their purpose if affected communities know what they are being consulted on. Understanding the nature and extent of a specific project for the exploitation of natural resources is essential to forming an opinion and voicing concerns. In practice, impartial and adequate information is rare. Generally, a high level of professionalization is necessary to find relevant information. For example, the Centre for Applied Legal Studies in South Africa attempted to obtain fifty social and labor plans for mining projects. Although a few companies did publish these plans, some companies held that such plans are confidential and cannot be shared. Furthermore, the information provided by companies during

consultation is often vague or in many aspects overly technical and therefore incomprehensible for community members without professional support. Potential benefits of projects are often not openly discussed and the environmental impact downplayed.

Inadequate logistics of consultations

«Main problem was that not all community members could access the place where the meeting took place as you had to pay some funeral fees and other subscriptions to the headmen in order to be allowed to enter. That was the meeting for the final license where a number of people were missing.»

Member of one traditional community affected by mining in Limpopo/South Africa

«They are consulting because they have to by law not because they want to solve problems. For many communities the consultation has been imposed from the outside, without being sensitive to the times and forms of the communities to take decisions. ... The consultation is not culturally adequate and in the end discriminatory against indigenous peoples.»

Staff member of a Mexican NGO working on land rights and dams in Oaxaca/ Mexico

A further problem relates to the format, date and place of consultations. In India, affected communities reported that consultations took place far away from their place of residence making it difficult for community members to take part. In addition, consultations often take place too late in the life-cycle of a project, and are rarely understood as being a continuous process that should apply to multiple decisions during the development of a pro-

ject, not just the initial approval. Furthermore, women are often excluded from engaging in consultations where those are carried out by traditional authorities that are based on paternalistic structures. In South Africa, for example, the traditional authorities representing communities usually consist only of male representatives, even though the law allows for female participation. Many impacts of mining are, however, felt particularly by women whose daily routines are severely altered once there is a mine in the area.

Lack of government neutrality

«In Odisha in a majority of cases the Gram Sabha (village council) says no. Then the government presents the decision nevertheless as a yes, which is how most of the projects come through»

Two members of a community based organization in Odisha/India

«Supposedly Free, Prior and Informed Consent is needed in all cases of infringements of Indigenous Peoples Rights, also without title. But the National Commission on Indigenous Peoples does not respect that and requires title. Otherwise, they do not even get active. That is a blatant violation of the law.»

Staff member of one NGO working on the rights of indigenous peoples in the Philippines

Governments find themselves in a conflict of interest as they are supposed to provide for a fair consultation process, but are interested at selling concessions at the same time. Many consultations therefore suffer from the government's inability to maintain a neutral position during consultations. The Paudhi Buyan tribe in Odisha in India faced this reality when they were presented with a fake consultation protocol where they had allegedly given their consent to an upcoming extension of an existing mining project by the Odisha Mining Corporation. The tribe organized another village council meeting and presented their contrasting result to the government in May 2016, though without governmental response. All too often, then, consultation procedures are just a bureaucratic step in order to obtain the legal approval for a project.

Privatized consultations

«The problem starts with the fact that the mining companies consult the wrong people. That has to be changed. Also, the government has to be there.»

Member of one traditional authority affected by mining in Limpopo/South Africa

«The company comes in and offers according to the needs in order to trick them in. In addition, they downplay the negative effects. Only later on the communities realize that the benefits given do not equal the damages suffered.»

Staff member of one NGO working on the rights of indigenous peoples in the Philippines

The obligation to consult the affected population is primarily a state duty. However, private actors also incur responsibilities under international law and consultations with affected communities are part of a company's due diligence for business activities according to Principle 18 of the UN Guiding Principles on Business and Human Rights. Some states have effectively delegated the duty to consult to corporate actors. In South Africa, the mining regulations impose a duty on companies to conduct a consultation with affected communities. Companies are expected to benefit from consultation as it minimizes operational risks arising from potential conflict («the business case for FPIC»). At the same time, once the industry has invested considerable capital, there is less willingness to accept a rejection of the project. Strong company involvement in consultations thus presents a considerable number of risks.^[25] Communities are highly critical of the conduct of companies during consultation. Community members and NGOs in Mexico and the Philippines reported that money, food, and other promises were offered by company representatives in order to persuade them to sell or lease their land and vote in favor of the project. Frequently, communities are divided as a consequence of company conduct. When some community members benefit from job offers, scholarships, or other benefits, they can become the strongest advocates in favor of the natural resource project. Such local tensions can lead to acts of intimidation and threats. Worryingly, social impact assessments were reported to be used by companies to scout for potential «troublemakers» in order to marginalize and silence them early on.

If community criticism is not taken seriously, consultations may lose all legitimacy. In the Philippines, some indigenous peoples already decided not to formally register as indigenous peoples out of fear that once registered it is easy to fabricate their consent to projects based on flawed consultation procedures. In Mexico, after negative experiences with consultations, some voices are now so critical of the existing consultation procedure that communities consider not participating in FPIC-procedures at all. This should be taken seriously and seen as a warning to improve consultation procedures before suspicion and skepticism leads to widespread withdrawal. It often appears that consultations are merely an exercise to endorse a *fait accompli*. This explains why direct action to stop projects becomes viewed as more successful than active participation in consultation procedures. For example, the POSCO project in Odisha was never completed as the South Korean company withdrew after years of preparation. For many, this is at least partially the result

25 Deanna Kemp & John R. Owen, «Corporate Readiness and the Human Rights Risks of Applying FPIC in the Global Mining Industry», *Business and Human Rights Journal*, Vol. 2 (2017), pp. 163 -169.

of the communities' strong unity and focus on local mobilization in blockades. Similarly, in Mexico, community representatives proudly reported successful road blockades in Mexico which prevented the delivery of turbines in San Dionisio, ultimately the wind park was never built.

Conclusion

Berta Cáceres was one of many activists who were killed during the past years as they attempted to have a voice in the decision-making about natural resource projects. Disputes about natural resource governance are characterized by a high number of killings. At the same time, such brutal murders are only one of the more visible ways in which communities and their organizations are systematically sidelined and put under pressure when they try to make themselves heard.

Pressures on those advocating for sustainable resource governance are closely related to particular steps of project development. Those targeted through criminal investigations, negative labeling, and defamation lawsuits tend to be the ones leading or participating in protests against plans for the construction of a mine, wind park, or a dam. Physical harassment is more likely to occur when project licenses are about to be approved or a judicial decision orders the suspension of such plans. A number of efforts have been developed to support those that face such pressure. Many of these strategies, though, are reactive and fail to prevent escalation of conflicts. There is the danger that civil society gets stuck in emergency responses, which is costly in terms of effort and resources.

While urgent actions campaigns are absolutely necessary, it is indispensable to change the very dynamics that are so characteristic of natural resource projects and that result in these killings and other forms of repression. In the case of Berta Cáceres, civil society has been very effective in making the link between her killing and the underlying economic structures and decision-making processes about the hydroelectric project. As a consequence of a long transnational campaign civil society managed to highlight the responsibility of the financial institutions behind the Agua Zarca dam and debates about the potential withdrawal of their funding for the project are still ongoing.^[26] Those providing financial backing for natural resource exploitation should exercise due diligence and verify if consultation procedures were adequate, and should withdraw support if procedures as outlined in

26 The Guardian, «Backers of Honduran dam opposed by murdered activist withdraw funding», <https://www.theguardian.com/world/2017/jun/04/honduras-dam-activist-bertha-caceres>; for the most recent less promising developments see the press release by COPINH, <https://copinh.org/article/copinh-la-trampa-de-los-bancos/>.

their own policies are not adhered to.^[27] States should also use their leverage to integrate human rights due diligence into the policies and lending practices of national development banks.^[28]

For as long as economic policies favor the extraction of natural resource without appropriate safeguards for and participation of affected people, the number of conflicts about natural resource governance will increase. Without adequate dispute resolution mechanisms, civil society will continue to face physical harassment, criminalization, stigmatization and other pressures. Moreover, local visions of resource development need to be taken seriously instead of being stigmatized as «anti-development.» Those affected by natural resource policies and projects have a right to be heard and have their views taken seriously. Inclusive, participatory and representative decision-making must therefore be included in economic policies on the highest level such as the G20 Action Plan on the 2030 Agenda for sustainable development.

Given the close link between pressures and the life-cycle of natural resource projects, more attention should be given to the ways in which consultations fail to fulfill their role to ensure community participation in natural resource governance. States and business easily agree that human rights defenders at risk need to be protected. At the same time, there is far less commitment to safeguarding the interests and objectives these defenders represent. Effective consultations are one way to create this commitment. States should secure a strong legal basis for consultations with affected communities. In addition to national legislation, governments should sign and ratify ILO Convention 169 and the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. A key problem in current consultation procedures is the lack of recognition of community voices in final decision-making. All too often, projects are approved that were unanimously rejected by affected communities. It should therefore be considered to adopt more widely the approach taken in the Indian Forest Act which grants the right to FPIC to all forest-dwellers, regardless of their indigenous origin.

Responsibilities should however not be borne only by states where resource exploitation takes place, but also by companies' home states which should play an active role in setting the right expectations for companies headquartered in their jurisdiction, for example, in National Action Plans on Business and Human Rights and in their export credit decisions. In this regard, a positive example is the guidance developed during the OECD complaint procedure in Germany on the responsibilities of turbine suppliers to wind parks to verify

27 E.g. World Bank Operational Manual 4.10 – Indigenous Peoples and IFC Performance Standard No.7 – Indigenous Peoples.

28 Working Group on the issue of human rights and transnational corporations and other business enterprises, «Report on its mission to Mexico», UN-Doc. A/HRC/35/32/Add.2, para. 108 (e).

whether land lease contracts, environmental assessments and consultations were properly done.^[29]

Furthermore, without adequate access to information about extractive or infrastructure projects, meaningful participation of civil society is impossible. National laws should provide opportunities to obtain relevant information as part of the regulatory framework for companies. Further, consultations are not a one-time effort to be completed with a tick-the-box approach. Consultations must start early on, ideally even before concessions are granted, in order to include local concerns early on, from the public tender stage. Afterwards, consultations should be an ongoing responsibility that exist throughout the life-cycle of a project but have to be formally carried out at least for every major change of the project design or implementation. Consultation results and environmental and social impact assessments have to be included in a binding agreement, including a reference to a dispute resolution mechanism that can ensure compliance.^[30]

Finally, due to their presence at a natural resource projects' operation site, companies are in direct contact with communities. So far, the role companies could and should play is not clearly defined. Companies should only consult affected communities in collaboration with and under control of government authorities. Clearer guidelines are needed to define dos and don'ts for company conduct during consultations.^[31] As companies tend to benefit from the unhindered operation of natural resource exploitation projects, they also benefit from the silencing of their critics. Companies must take this seriously. Recent publications indeed attempt to highlight the business case for respecting and encouraging civil society engagement.^[32] Companies have to speak out about restrictions they witness in relation to their projects and use their leverage to prevent them. In addition, they should push for independent investigations. Maybe most importantly, as recommended by the UN Working Group on Business and Human Rights, companies will need to «accept that... consultation processes might result in a change to the project.»^[33] For example, as an alternative business model, UN Special Rapporteur James Anaya emphasizes genuine partnership and sharing of benefits to strengthen indigenous people's capacity to establish and pursue their own development priorities by participating in project decision-making and sharing

29 German National Contact Point for the OECD Guidelines, Final statement on a complaint by Mr. Dominic Whiting against NORDEX SE, http://www.bmwi.de/Redaktion/DE/Downloads/A/abschlusserklaerung-nks-dominic-whiting-gegen-nordex-se.pdf?__blob=publicationFile&v=4.

30 Shalanda H. Baker, «Why the IFC's Free, Prior, and Informed Consent Policy Doesn't Matter (Yet) to Indigenous Communities Affected by Development Projects», University of San Francisco Law Research Paper No. 2012-16.

31 See for some guidance: Swedish and Norwegian National Contact Points for the OECD Guidelines, e.g. Jijnjevaerie Saami Village v. Statkraft, https://www.oecdwatch.org/cases/Case_280.

32 Dhananjayan Sriskandarajah, «The Business Case for Civic Space», <http://www.brinknews.com/the-business-case-for-civic-space/>.

33 Working Group on the issue of human rights and transnational corporations and other business enterprises, «Report on its mission to Mexico», UN-Doc. A/HRC/35/32/Add.2, para. 109 (f).

in profits through agreements with companies (for example through minority ownership interest).^[34]

Civil society is part and parcel of all political processes, be they national or international. It can shape political processes, successfully organize political participation, uncover corruption and human rights abuses. Restricting civil society's engagement and denying the political participation of civil society in decision-making processes about natural resource governance will hinder efforts to build sustainable and just societies.

34 Elisa Morgera, «Under the radar: fair and equitable benefit-sharing and the human rights of indigenous peoples and local communities related to natural resources», 20 December 2016). BENELEX Working Paper N. 10, <https://ssrn.com/abstract=2887803> or <http://dx.doi.org/10.2139/ssrn.2887803>.

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Acknowledgements

The authors like to thank their colleagues at ECCHR for their support and comments on draft versions of this paper. A special thanks is also warranted for Julia Duchrow, Ben Leather, as well as Axel Harneit-Sievers, Claudia Rolf, Ingrid Spiller, Jochen Luckscheiter and Layla Al-Zubaidi who have provided valuable comments on earlier versions of this paper. Finally, we would like to thank the Heinrich Böll Foundation for the cooperation that allowed us to conduct the research that was necessary for this paper.

Imprint

Published by: Heinrich-Böll-Stiftung e.V in cooperation with the European Center for Constitutional and Human Rights

Contact: Claudia Rolf, Department Head Democracy Promotion, E_rolf@boell.de

Place of publication: www.boell.de

Release date: Juni 2017

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