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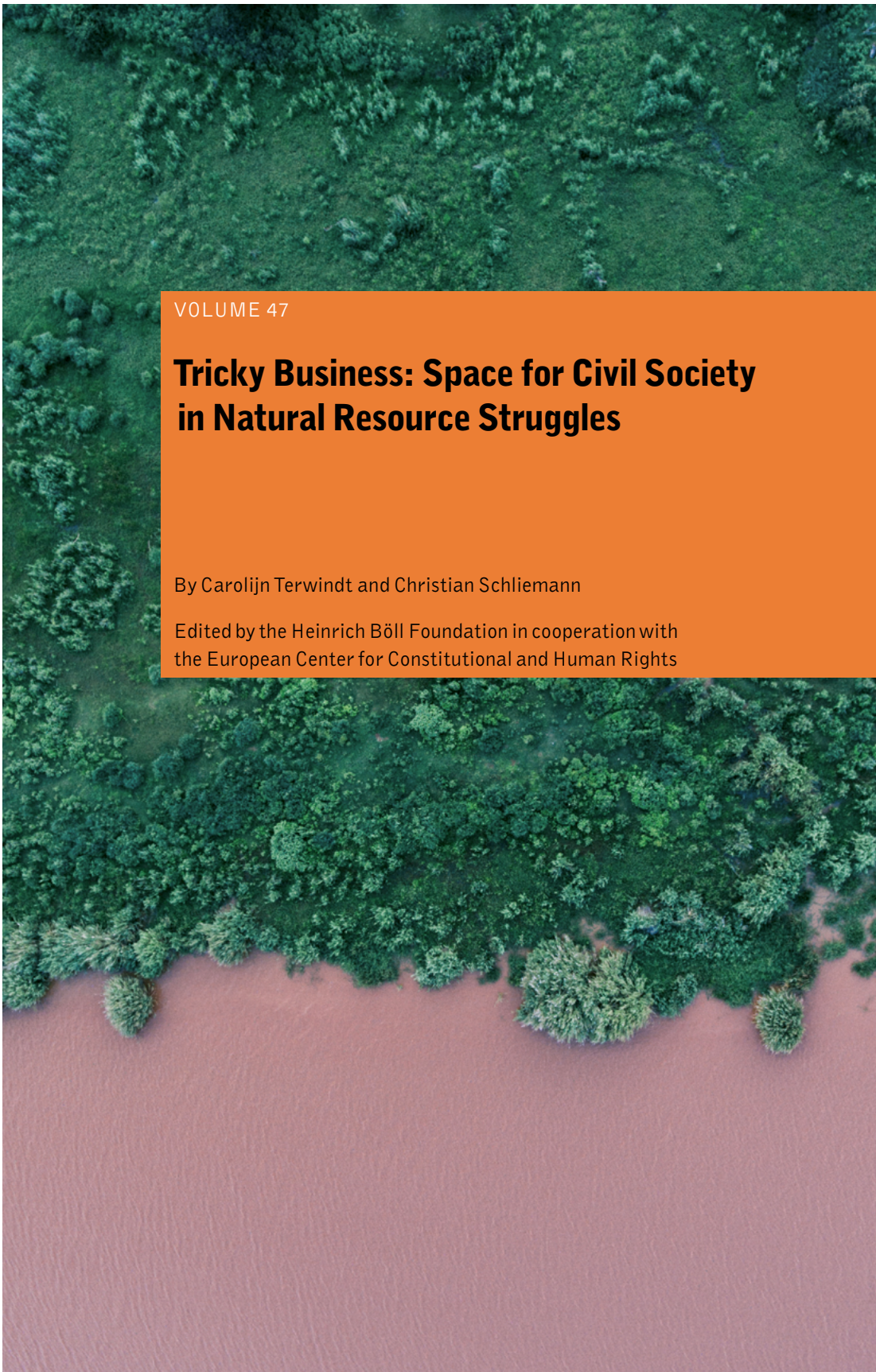

VOLUME 47

Tricky Business: Space for Civil Society in Natural Resource Struggles

By Carolijn Terwindt and Christian Schliemann

Edited by the Heinrich Böll Foundation in cooperation with the European Center for Constitutional and Human Rights

EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS
ECCHR

TRICKY BUSINESS: SPACE FOR CIVIL SOCIETY IN NATURAL RESOURCE STRUGGLES

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By Carolijn Terwindt and Christian Schliemann

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The views expressed in this publication are those of the authors and do not necessarily represent the views of the Heinrich Böll Foundation or the European Center for Constitutional and Human Rights.

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By Carolijn Terwindt and Christian Schliemann
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FOREWORD

We are experiencing an unprecedented worldwide race for natural resources: Governments and national as well as transnational corporations are driving the demand for water, land, fossil fuels, raw materials, and organic resources of all kinds, as never before. Previously intact ecosystems are being sacrificed to satisfy this hunger for resources. Forests are being cut down and arable land destroyed, soils contaminated, water consumed or tainted on a grand scale, air polluted, and the climate impacted.

Thousands of people are losing their livelihoods and are being more or less forcibly displaced as a consequence. The few hard-fought participation rights of the public that have made it into law in recent decades, as well as ecological and social standards – assuming any existed in the first place – have impeded investors and their attempts to explore and extract resources. Therefore, these rights and standards are being curbed or watered down.

Citizens, organized civil society, social movements, and affected communities worldwide are pushing back against these developments. They are fighting for their rights, working to preserve their livelihoods, and insisting on democratic participation. Local populations, communities, and organizations that have different ideas about the use of natural resources – and of a socially just and fair economy as well as distribution – are coming under pressure. Questions, criticism, and protests are increasingly being met with repression, harassment, and defamation. Business interests and profit-orientation are, thus, competing with sustainable and just resource policies, environmental protections, democratic standards, and human rights.

The scope of action for civil society actors opposing large-scale projects; protesting social injustices, land grabbing, and environmental destruction; and demanding democratic participation and human rights is shrinking continually. The fact that the rights of civil society are being curtailed worldwide is, unfortunately, not a new finding, but the current scale and scope are new and dramatic. In light of the issues at hand, democratic civil society, in particular, can engage in the critical monitoring of investments in infrastructure and resource extraction, collect information, demand transparency and accountability – not least through legal action – as well as organize communication, shape public opinion, and stage protests. A democratically negotiated diversity of opinions and interests does not seem to mesh with business logic, as it costs time and money and stands in the way of swift project implementation. In addition, whereas the interests of investors enjoy protection, the same cannot be said about human rights and the environment.

The Heinrich Böll Foundation is active in all regions of the world. Together with its project partners, the Foundation is experiencing first-hand how democratic principles and the social and cultural foundations of people and local communities are

being violated. In this study, which we have produced together with the European Center for Constitutional and Human Rights (ECCHR), we want to show how the mechanisms of expropriation and the undermining of human rights work. At the same time, we want to help develop strategies to strengthen democracy and human rights. We therefore wanted to know how civil society actors and affected communities that take a critical stance toward resource projects are restricted in their scope of action. The authors – Carolijn Terwindt and Christian Schliemann of the ECCHR – traveled to India, South Africa, Mexico, and the Philippines to study projects and talk to civil society activists and organizations on the ground. The resulting analysis provides us with insights on how we can better address and monitor resource and environmental policy projects. The counterstrategies that civil society actors use to defend themselves against restrictions and repression are particularly revealing. The authors call for corporations to take greater responsibility for the negative consequences of resource depletion and for the associated restrictions on civil society's scope for action. The use of legal remedies is shown to be another way forward, albeit a difficult one in view of the structural hurdles. Nevertheless, it is a viable way for civil society to defend itself against criminalization and the curtailment of civil political rights. After all, opportunities for participation – above all, consultation and the requirement for the consent of the affected communities – must be taken seriously and protected against misuse as simple tools to legitimize projects. We also hope that this study will prompt governments and businesses to establish a sustainable and just resource policy and acknowledge the role of civil society.

We would like to thank, in particular, all those who shared their experiences and strategies with us on the ground, as well as the authors of this study, who carried out their research with thoroughness, sensitivity, and care and summarized the results in an insightful analysis. Claudia Rolf monitored the entire project in terms of content, concept, and organization – we would like to thank her as well. Finally, we would like to express our gratitude to all those who contributed to the success of this study with valuable comments and suggestions.

Berlin, November 2017

Barbara Unmüssig
President, Heinrich Böll Foundation

Wolfgang Kaleck
General Secretary, ECCHR

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Our thoughts are with the community members in Oaxaca, thousands of whom lost their homes in the earthquake on September 8, 2017, while the earthquake on on September 19, 2017 affected interviewees in Mexico City. We also stand in solidarity with the peasant communities and indigenous peoples in Mindanao, harshly affected by martial law, who nevertheless continue their struggle for recognition of their land rights. Their struggles, as well as the other protests we were so graciously afforded the opportunity to learn about in South Africa and India, are dangerous activities to be engaged in nowadays. With this study we aim to make a contribution to their struggle to remain free to raise their voices and criticize the natural resource development projects planned in their territories.

In the preparation of the field trips and interviews, we were supported by the invaluable guidance and assistance of our partners in India, the Proyecto de Derechos Económicos Sociales y Culturales (ProDESC) in Mexico, Kilusang Magbubukid ng Pilipinas (KMP) in the Philippines, and the Legal Resources Centre (LRC) staff in South Africa. We further extend our thanks to Albert Koncsek at the ECCHR office for his support, and to the trainees at ECCHR who provided the necessary background research: Corina Ajder, Amy Armstrong, Jakob Aschemann, Shaelyn Gambino, Judith Hackmack, Malka Manestar, Marie Miermeister, Beatrice Pesce, Darius Reinhardt, Michaela Streibelt, Sarah Schadendorf and Juliette Vargas.

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Carolijn Terwindt and Christian Schliemann

EXECUTIVE SUMMARY

Resource and energy demand has increased over the last few decades, with more extraction and land use happening in more countries than ever before. The rising resource demand from the industrialized countries and emerging economies depends on the resources located in the Global South. Many governments in the Global South have opted to advocate for natural resource exploitation as a pathway to greater socio-economic development. However, this route needs to be challenged by looking at the actual benefits and costs imposed on people and the environment by current practices in the natural resource arena. The perspective of many affected communities is clear: They do not currently stand to gain, and indeed often suffer, from present approaches. Accordingly, they are calling for greater participation in decision-making and protection of their rights in natural resource development and governance.

Opening up lands for resource development projects in the Global South generally goes hand in hand with enshrining participation rights for the public to ensure their input in decision-making. In many places, however, civil society actors who are pushing for a greater say in project implementation or resource governance face increased pressures. When non-governmental organizations (NGOs), community-based organizations, and their individual members make claims about the use of natural resources, they face particular threats to – and restrictions on – their space, generally characterized by a high level of physical intimidation, and even lethal violence. These pressures may also include the initiation of unfounded criminal investigations, surveillance, defamation, burdensome registration requirements for NGOs, stricter regulation of foreign funding for NGOs, and the restriction on demonstrations. Such pressures on civil society in the natural resource arena are not an isolated development, but part of a larger, seemingly global trend to cut back civic space, as documented by organizations such as CIVICUS in their annual State of Civil Society Report, or by the UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and Association.

The concept of «space» moves attention away from single types of pressure, for instance a narrow focus on the freezing of funding. It thus serves to more fully capture the wide range of pressures and restrictions experienced by civil society organizations. In addition, it enables studying the interaction between – and possibly sequences of – different forms of restrictions. Space, then, denotes the possibility and capacity of civil society to function in non-governmental or community-based organizations and to perform its key tasks. Without a real place at the table, civil society space can deteriorate into «fake space.» A study of civil society space should,

therefore, not only focus on the pressures faced, but also include an analysis of civil society's ability to use that space to actually obtain a real voice and induce change.

Country comparison of claims to natural resources

The study at hand was 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, the Philippines, Mexico, and South Africa. These four countries have huge reserves of natural resources, whether in the form of deposits for extraction or vast tracks of land suitable for energy production or industrial agriculture. They are all also home to conflicts about their natural resources, in particular with regard to their exploitation, development, and governance. In addition, the four countries can be considered «partial democracies,» in contrast to strong authoritarian or strong democratic states.[1] One salient feature of partial democracies is the difference between the *de jure* space of NGOs, which is the space they should have according to applicable legislation, and the *de facto* space of NGOs, or the actual existing space in which they operate (Van der Borgh & Terwindt 2014, 15–16). This study relies on qualitative interviews conducted with grassroots organizations and NGOs working in the field of natural resources. In addition, individuals were interviewed who are working on the international level for international NGOs or governmental institutions and whose mandate explicitly includes the support of civil society or the protection of human rights defenders.

Patterns in restrictions

The examples of natural resource governance in Mexico, South Africa, the Philippines, and India show how laws and administrative decisions allow for and foster natural resource extraction without ensuring adequate participation rights. Guarantees for participation, albeit enshrined in national legislation, do not automatically protect those affected. On the contrary, communities, civil society activists, and NGOs often have to actively advocate for being included in decision-making by government or the private sector. If communities and NGOs push to be heard and have their criticisms taken into account, violations of their civil and political rights frequently ensue through, for example, defamation in the media, threats per SMS, arrest warrants, or even killings. The sequence and kinds of pressures on civil society tend to follow the logic of natural resource exploitation and are often traceable to specific stages in a project.

Early on, information is rarely made available to communities, hampering any efforts to make an informed decision or mobilize. As soon as critics start speaking

1 For the purposes of this study, the countries are considered partial democracies if they received a rate between 2 and 4 in the Freedom House rating in 2016 (South Africa 2; India 2.5; Mexico 3; Philippines 3).

up about a project's negative impacts and their opposition to it, they face pressure. This pressure can be in the form of targeted intimidation, stigmatization, or the criminalization of individuals or organizations. The stage of a project in which extraction licenses get approved is often marked by high levels of contention. Public protests can lead to mass criminalization, administrative restrictions on the freedom of assembly, or physical encounters, and vice versa. Finally, not only, but in particular, leaders who continue to resist the implementation of extractive projects despite earlier threats and defamation can risk being killed.

Even though killings are certainly the most drastic threat faced by communities and NGOs, already before such killings occur, many communities may have been intimidated to an extent that leads them to the decision to remain silent. Killings really are only the tip of the iceberg, and support for community members and NGOs should thus come long before they face physical harassment. It has also become clear that a number of actors play a role in putting pressure on those speaking out, ranging from government bureaucrats and police forces to private security guards, company managers, and neighbors in communities.

Designing strategies to defend and reclaim space

In response to such threats, civil society, in coordination with governments and international institutions, has developed a wide range of measures and coping strategies to shield and protect community-based organizations, NGOs, and their individual members against such pressures, and to reclaim space for organizing and speaking out. Lessons learned have been collected in a number of manuals and toolkits, which can serve as guidance to other organizations and communities. Some measures focus on protecting physical integrity and security, such as access to emergency grants, security training, provision of secure spaces or relocation, accompaniment, medical assistance and stress management facilities, awards and fellowships, or solidarity campaigns and visits. Other strategies have been developed specifically to counter administrative restrictions on registration, operation, and funding of NGOs, or for responding to fabricated charges. While some of the strategies thus counter particular types of pressures, guidance has also been developed to explain the availability of support that can be offered by European Union missions, United Nations institutions, or national human rights institutions. Specific attention has also been paid to the particular risks for women who take leadership roles and speak out publicly.

Thus, although a variety of measures and support mechanisms exist, it can be difficult to assess what is most strategic in a particular situation. As one of the most prevalent forms of defensive responses, affected community members and NGOs often opt for emergency response measures. Yet, these ad hoc measures present a number of problems. Security precautions may end up being so time-consuming that those at risk might prefer to focus on their political work instead of meticulous adherence to security protocols. Meanwhile, choosing to fly under the radar may result in unintentionally downplaying or obscuring the extent and nature of the

threats and harassment they face. With limited time and resources, organizations have to make choices and may end up getting caught in reactive response loops, leaving fewer capacities to dedicate to longer-term strategies.

In addition to short-term response measures, movements try to develop proactive, longer-term strategies. Through visibility campaigns, they strive to expose restrictions on the space of civil society and the authors of such pressures. Affected communities, civil society activists, and NGOs also engage in human rights advocacy with government actors to guarantee a secure space for the exercising of their political and civil rights. These long-term strategies face a number of challenges. For example, the decision to go public and demand accountability might mean exposing victims of harassment to further threats. Reliance on human rights entails further dilemmas. Although human rights advocacy is the most prevalent framework to counter pressures on civic space, it has limits when economic interests are at stake or when governments refuse to pledge adherence to human rights. Against this background, it is indispensable to develop further proactive strategies countering the very dynamics that are so characteristic of natural resource projects and that allow for, and result in, killings and other forms of restrictions.

Changing structures – enabling participation

Given that the type and sequence of pressures are closely related to the stages and actors in the natural resource arena, proactive strategies can push for changing those structures that shape natural resource development. This report addresses three such structuring elements: consultations, business, and law.

Consultations: An essential step in resource development legislation, policies, and projects is the inclusion of civil society, and affected communities in particular, in decision-making. Protests and conflicts are often intensified by thwarted attempts at meaningful participation. One tool that has become widespread in law and practice is the «consultation» process, which is at the heart of civil society participation in decision-making about natural resource projects. Increasingly though, consultations have been criticized as hollow exercises to legitimize extractive projects, without taking local concerns into account. When affected communities and NGOs set out to exercise their rights to freedom of expression and peaceful assembly against this continued exclusion, destructive dynamics may be set in motion in which community divisions, defamation of leaders and NGOs, and public protests can eventually lead to physical confrontations that sometimes result in violent actions against civil society, including targeted killings. Certain fundamental changes are needed to avoid consultations becoming mere window dressing to push through extractive projects. For example, civil society participation should not only be guaranteed once a project is planned, but also in the adoption of trade rules in multilateral and bilateral fora, legislative proposals on extractive industry regulations, and national and regional development plans. Consultations must rely on adequate access to information. The imbalance of power between businesses and communities needs to be

tackled, and financial institutions should create the right incentives. Benefits should be shared adequately, and it should be recognized that not all projects are viable.

Business: Response strategies that deal with the involvement of business actors are poorly developed. What is expected of corporations in the natural resource arena needs to be made more explicit, and new ways must be found to push business actors to live up to their responsibilities. Business is still all too often viewed as an «outsider» to local dynamics, thus exempting them from actively preventing and countering the pressures faced by civil society members and NGOs critical of particular projects or development policies. Business should be pushed to implement the, at times promising, rhetoric it has adopted, and be reminded of its responsibility through complaints in (quasi) judicial fora. Financial institutions and the money they provide are often the backbone of natural resource projects, and the leverage they have over business behavior should be utilized more effectively to enforce relevant standards on community protection. Companies need regulation and oversight, and home as well as host states should assume a more prominent and effective role in implementing such structures.

Law: Legislation plays a key role in shaping natural resource governance, but it often favors corporate investments over the protection of local communities. Laws are also instrumental in restricting civic space through administrative regulations or practices of criminalization. At the same time, though, social movements can use legal instruments strategically as leverage vis-á-vis more powerful actors. Communities and NGOs therefore need tools to counter legal pressures and develop strategies to use legal procedures to reclaim their space and influence.

INTRODUCTION

The killing of Berta Cáceres in Honduras on March 3, 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 only one part of the story. The concept of «shrinking space» has been put forward to more fully capture the wide range of pressures and restrictions experienced by civil society (Unmüßig 2016; for a critical assessment: Hayes et al. 2017). These pressures include physical harassment as well as the initiation of criminal investigations, surveillance, defamation, burdensome registration requirements for non-governmental organizations (NGOs), the stricter regulation of foreign funding for NGOs, the restriction on demonstrations, and the more general exclusion of civil society. According to some commentators, civil society space currently faces an emergency situation, given the many new restrictions put in place in various countries all over the globe in recent years (CIVICUS 2017, 7). Patterns in pressures on civil society are most usefully analyzed within a particular context. 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, NGOs, and civil society activists attempt to influence the management of natural resources, they often experience strong negative reactions from political and corporate actors defending their own interests. Governments are responsible for a significant part of these pressures, but in conflicts about natural resource projects, the private sector also plays a role. In the case of Berta Cáceres, not only military officers, but also the head of security of the private company 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 research project was designed to uncover the common patterns and dynamics of restrictions on – and coping strategies adopted by – civil society actors in the specific context of natural resource struggles. The first part of the report sets

the scene by introducing the research methodology, civil society's role in public participation in political decision-making, and the global economic context of natural resource governance (PART 1).

Four different contexts of natural resource development located in four different countries – India, Mexico, the Philippines, and South Africa – provide the background of the report. Each of the four country chapters introduces the relevant political and legal framework determining natural resource development in the respective country and focuses on a particular type of natural resource exploitation – mining, agribusiness, or energy creation through wind parks (PART 2).

The stages of natural resource development shape the patterns in the sequence and kinds of restrictions on the space of NGOs and communities. 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 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 pressures. Many of these strategies, though, are reactive and fail to prevent the escalation of such conflicts. There is the danger that civil society gets stuck in short-term responses to immediate threats, which are costly in terms of effort and resources (PART 3).

The fourth and final part, therefore, examines further strategies by putting the spotlight on three structuring elements that shape the stages and power dynamics in resource exploitation: consultations, business, and law. Proactive strategies that aim to influence these structural elements of natural resource development may thus push for changing the «rules of the game» (PART 4).

PART 1

SETTING THE SCENE

1 Research design and methodology

The study underlying this report was designed to explore patterns and dynamics of restrictions on the space of civil society actors and response strategies to counter and overcome these restrictions. In this chapter, the methodology and research methods will be described, explaining (1) the main research questions that shape the study; (2) the country selection of India, the Philippines, Mexico, and South Africa, as well as the choice of the specific industry sectors examined in each; and (3) the methods used in data collection.

1.1 Main research questions

This report deals with restrictions on the space of civil society actors and their response strategies in contexts of natural resource development. Pressures on civil society are usually felt the most by affected communities and their local organizations, whose situation is therefore a particular focus of this study. National and international NGOs working on natural resource development are also subject to certain types of pressures, which are likewise included in the report. Lastly, special attention is paid to «broker» organizations, as they link grassroots community organizations to national and international advocacy and networking structures.

Restrictions are not studied as a stand-alone fact, but as part of the development of contention and conflict in the natural resource arena. Additional focus is given to the response strategies used to counter these pressures. The industry sectors covered include mining, energy production through wind parks, and large agricultural plantations. These sectors are examined in four different countries, two of them located on the Asian continent (India and the Philippines), one on the African continent (South Africa), and one in Latin America (Mexico). The study is particularly interested in how restrictions operate in these four contexts of natural resource development and what kind of impact they have on civil society actors, including on their response strategies.

In the context of this study, natural resource governance refers to the design of the regulatory environment allowing for (or not) the development of natural resources for economic benefit, through international and national policies and laws, as well as their interpretation, application, and implementation in local settings through individual projects. Natural resource development is understood broadly to not only include the extractive sector, but also covers the production of energy, such as through wind parks and hydro-electric dams, as well as industrial agriculture. Although the latter activities do not aim to extract any raw materials, they are nevertheless dependent on the use of natural resources, in particular land and water.

Natural resource development not only takes place on the local and domestic levels, but is increasingly embedded in a global economy of raw material extraction and trade. This study therefore takes into account the global economy of raw materials, in which Europe, North America, and China are main importers. Most countries from which resources are extracted are situated outside of these major importing regions and often do not process raw materials, but only export them. Thus, the study examines how the development strategy of natural resource exploitation operates globally and in the selected countries, in both law and practice.

Individual projects that depend on the large-scale use of land – either as the location for economic activities or for the extraction of raw materials – often cause friction with local communities and civil society actors over concerns related to potentially negative impacts of land and resource exploitation. Accordingly, this study explores which moments in the development of natural resources typically trigger civil society engagement and contestation, and the issues at stake in these instances.

At the same time, patterns of restrictions at play against civil society actors who attempt to engage in decision-making related to natural resource exploitation have been studied in a vast range of publicly available literature, mostly conducted and written by civil society itself (in lieu of many others: ACT Alliance & CIDSE 2015). Although civil society can include a wide variety of actors, such as trade unions, journalists, and religious organizations, this study focuses particularly on grassroots and community-based organizations and professional NGOs, often as part of larger social movements. In many existing studies, restrictions facing civil society are simply enumerated in lists of individual measures, which are often analyzed separately rather than in conjunction with the substantive issues at stake in the political conflicts underlying them. Furthermore, the restrictions faced by civil society actors are primarily studied in relation to state actors. However, investigating the role of business actors as perpetrators, contributors, and silent profiteers of restrictions and, hence, as equally relevant targets of activism, has been identified as a significant issue for further research (UN Working Group on Business and Human Rights 2016). This is particularly so in the field of natural resource development, where business involvement is inherent in most industrial activities on the ground. Therefore, this research also asks how corporations impact civil society actors' ability to meaningfully participate in decision-making about natural resource development.

Pressures on space for civil society in the natural resource arena have become a separate subject of study in the last decade, due to alarming reports of the hardships faced by civil society actors when they engage with decision-making related to natural resource development or express dissent (among others: Publish What You Pay & CIVICUS 2016). Killings, physical attacks, and intimidation are often reported as a characteristic feature of contestation over natural resource governance. Restrictions in the natural resource arena are, however, not limited to these most severe forms of repression. Other types of pressure facing civil society include criminalization, stigmatization, and tactics used to divide communities (Van der Borgh & Terwindt 2014, 106–118). Accordingly, this study asks what restrictions civil society

actors experience, both in law and practice, when they engage in decision-making over natural resources.

Civil society actors can – and do – respond to the restrictions that they experience. The available literature offers a number of best practice guides and toolkits related to individual or collective security from physical harm and threats, to ways and means to defend against legislative and administrative attempts to curtail the operational space of legally registered organizations (ISHR [International Service for Human Rights] 2016; Front Line Defenders & Tactical Tech 2009; Front Line Defenders 2011; UN Office of the High Commissioner for Human Rights 2015).

Civil society response strategies in relation to natural resource struggles are part and parcel of the overall literature on the topic (Friends of the Earth 2014; CIEL [Center for International Environmental Law] 2016). Some publications on response strategies also address the individual experiences and assessments of affected communities and organizations (Act Alliance & CIDSE 2015, 8; Human Rights Watch 2015). However, assessments of the viability and effectiveness of response strategies often remain rather vague. Thus, this report's final research question asks what «response» strategies has civil society developed and employed against restrictions of civic space in the context of natural resource governance, and which of these strategies have proven successful in reclaiming space for engagement. Based upon the research in the four selected countries, the study aims at distilling insights and lessons learned for civil society organizations operating in similar contexts.

1.2 Selection of countries

Four countries were selected for this study: India, Mexico, the Philippines, and South Africa. Each country provides a particular industrial sector for the analysis of the main research questions. All four countries have huge reserves of natural resources, whether in the form of deposits for extraction or vast tracks of land suitable for energy production or industrial agriculture. They are all also home to conflicts about their natural resources, in particular with regard to their exploitation, development, and governance. In addition, the four countries are all «partial democracies,» in contrast to strong authoritarian or strong democratic states.[2] As Van der Borgh and Terwindt point out, one salient feature of partial democracies is the difference between the *de jure* space of NGOs, which is the space they should have according to applicable legislation, and the *de facto* space of NGOs, or the actual existing space in which they operate (Van der Borgh & Terwindt 2014, 15–16). The political context in partial democracies allows, at least on paper, the exercise of democratic rights in civil

2 Strong democracies would be rated with the highest score in the Freedom House ranking (e.g., Belgium and Sweden receive 1). Strong authoritarian regimes receive the lowest scores (e.g., Saudi Arabia and Equatorial Guinea receive 7). Less authoritarian regimes receive relatively low scores (e.g., Zimbabwe receives 5 and Angola receives 6). For the purposes of this study, the countries are considered partial democracies if they received a rate between 2 and 4 in the Freedom House rating in 2016 (South Africa 2; India 2.5; Mexico 3; Philippines 3).

society. In practice, however, state or private actors may curtail these rights without being held directly accountable.

Besides this shared political context, the countries are comparable in some other relevant ways. They are all located in the Global South and have populations exceeding 100 million. Important for our focus on contestation surrounding natural resource projects, all four countries have seen an increased liberalization of their national markets in relation to natural resource exploitation since at least 1990. Policy changes, new regulations, and international agreements have opened up these countries, granting easier access for – and facilitating the implementation of – commercial projects related to natural resources. Finally, all four countries possess, at least in some of their regions, deposits of primary materials relevant for the global trade in agricultural or extractive products.

The countries were deliberately chosen from different continents in order to capture a broad spectrum of restrictive patterns, and thus extend the relevance of this study's results to countries across the globe. Moreover, all four of the countries have experienced contestation over natural resource governance in some of their provinces, including pressure and restrictions against civil society actors seeking to influence decision-making related to natural resources (for an overview on the respective countries: VANI Voluntary Action Network India] 2014; HURISA 2015; UN Working Group on Business and Human Rights 2017; Observatory for the Protection of Human Rights Defenders 2015).

Although commonality is the primary basis for the country selection, this does not preclude an analysis of the scope and complexity of repressive measures across the natural resource development sectors. The report attempts to explore the range and diversity of restrictions suffered by civil society and the strategies that they have developed in response. In addition, the four domestic contexts, each with their different industry sectors (mining, renewable energy, and industrial agriculture), allow for a better exploration of the relationship between the very logic that drives processes of natural resource exploitation and the patterns of restrictions experienced by civil society. As we will show in Chapter 3, particular moments and milestones in resource exploitation projects are particularly relevant for the scale and character of restrictions leveled against civil society actors.

1.3 Research methods

In order to concretize the main research questions, extensive desk research was carried out. One output of this meta-study was a semi-structured interview guide, which was used as an operational tool for carrying out qualitative interviews in the four domestic contexts. The interview target groups were community-based and grassroots organizations and NGOs working in the field of natural resource development. In addition, individuals working at the international level were also interviewed whose mandate explicitly includes the support of civil society or protection of human rights defenders, such as one member of the Working Group on Business and Human Rights and staff members of the UN mandate of the Special Rapporteur

on Human Rights Defenders. The interview guide was adapted to each of the three groups and enabled the interviewee to expand on points of interest without being limited by the questions. In total, 60 interviews were conducted. Between November 2016 and May 2017, the following interviews were carried out per country:

- 4–6 representatives of communities, grassroots organizations, or local social movements directly affected by natural resource exploitation projects;
- 3–6 local NGOs or branches of larger national or regional NGOs working on the topic of natural resource development, preferably in the specific industry sector (mining/energy/agriculture);
- 12 interviews with staff from international civil society and inter-governmental organizations whose mandate includes supporting civil society actors facing restrictions.

All descriptions of the individual cases contained in this report are based on the interviews conducted in the respective countries. References to names of individuals or organizations have deliberately been omitted. Further practical examples from other countries as well as theoretical insights were taken from existing academic and civil society literature to complement experiences reported by interviewees.

The interviews included an element of participatory action research. The idea behind this action research was to identify and weigh possible options to protect and enlarge civic space against pressures experienced in specific constellations. The authors therefore conducted interviews with local organizations about their predicaments, for example, about being faced with physical harassment or criminal charges, as well as the response strategies in which the affected NGOs or communities engaged and potential further strategies to defend and reclaim space. The actual search for – and development of – support measures for the particular cases reported during interviews fed into the analysis of response strategies. In addition, interviews with other actors, for example, members of European Union (EU) delegations, allowed the authors to further reflect on the accessibility and effectiveness of these modes of intervention.

2 Development of natural resources and participation of civil society

Resource and energy demand has increased over the last few decades, with more extraction and industrial land use happening in more countries than ever before. Many governments in the Global South have opted to advocate for natural resource exploitation as a pathway to development. However, this route needs to be challenged by looking at the actual benefits and costs imposed on people and the environment. The perspective of many affected communities is clear: They do not stand to benefit from current resource exploitation approaches and therefore call for greater participation in natural resource development. Typical for liberal democratic approaches, opening up lands for natural resource development has generally gone hand in hand with enshrining participation rights for the public to include their input in decision-making. Participation rights include the right to information, consultation, freedom of expression, and freedom of assembly and association. In reality, when affected communities and NGOs set out to influence such projects, they often face a number of pressures that restrict their space. These pressures include physical harassment, initiation of unfounded criminal investigations, surveillance, defamation, burdensome registration requirements and stricter regulation of foreign funding for NGOs, and the restriction on demonstrations. Such pressures on civil society in the natural resource arena are not an isolated development, but part of a larger global trend.

2.1 The design of natural resource development

Natural resource extraction and land use for industrial infrastructure is determined by global demand for raw materials, energy, and agriculture. The current global economy and trade of natural resources serves to secure the supply of these materials, but must also manage its negative impacts, which include environmental degradation, social conflict, and the exclusion and harassment of civil society actors who contest natural resource exploitation practices and consequences. Disagreement about the best path of development lies at the heart of many contestations related to individual resource exploitation projects and the laws and policies that support them. Natural resource development is ambiguous and open-textured in terms of its objectives, used by different actors for, at times, incompatible purposes. On the one hand, raw materials can be conceived of as simple commodities. Indeed, a global web of trade relationships based on raw materials and secondary commodities exists. On the other hand, land and raw materials must also be viewed within the

social, political, and cultural contexts in which they serve purposes other than as commodities for domestic consumption, industrial use, or international trade. Raw materials are often located in regions with important environmental ecosystems and in areas populated by indigenous or other rural communities, who rely on the land and its resources for a variety of purposes. Reconciling these competing views requires civil society participation in the decision-making about natural resources. Enabling such participation is one important strategy for inclusive and just natural resource governance and a means to minimize its negative impacts.

Economy of raw materials

In the last 10 years, economic studies using material flow accounting have offered the possibility to look at the extraction and consumption of natural resources on a global scale, including who bears the costs versus who benefits from natural resource extraction (Schandl & Eisenmenger 2006, 133–147; Behrens et al. 2007, 1–10). According to these studies, global used resource extraction grew steadily, from 40 billion tons in 1980 to 55 billion tons in 2002 (Behrens et al. 2007, 3). Asia and Latin America's share in global used resource extraction increased, whereas extraction in North America, Western Europe, and Oceania declined, and extraction in Africa remained relatively constant.

In contrast to the annual growth of 2.7% in resource extraction from 1990 to 2010, the international trade of raw materials grew even faster, by 3.5% annually. Interestingly, both extraction and trade growth rates were higher than the annual population growth rate of 1.6% in the same period, indicating that not only did the population increase require more resources, but also that there was a surge in overall consumption (United Nations Environment Programme 2016, 31). The data presented by the United Nations Environment Programme, moreover, clearly shows that Europe was – and still is – the main importer of traded material (direct physical trade of primary material and trade of secondary commodities), followed by the United States. Africa has been a constant net importer of both raw materials and secondary commodities throughout the years, with a slight upsurge in the amount of secondary commodities imported. The Asia-Pacific region – with China and India at its forefront – also figures among the net importers of raw materials, but it is a net exporter of materials that have been converted into secondary commodities, shifting consumption back to the United States and Europe (ibid. 2016, 56–58).

Policies and rules that regulate natural resource extraction and trade are shaped on the international and domestic levels by states, but also by international institutions, including financial institutions. To maintain a steady supply of the raw materials needed for domestic industries, recipient states have enacted policies that also affect the regulatory space of producing countries. The EU Raw Materials Initiative, for example, explains that «the EU is highly dependent on imports of strategically important raw materials which are increasingly affected by market distortions» (Commission of the European Union 2008, 2). Such «distortions» include export taxes and quotas, along with subsidies, price-fixing, dual pricing, and restrictive investment rules. In order to tackle these measures, the EU's raw materials strategy

aims to «ensure access to raw materials from international markets under the same conditions as other industrial competitors» and lists a number of possibilities for intervention, including ensuring compliance with international commitments at the multi- and bilateral levels, the World Trade Organization (WTO) and free trade agreements, and the elimination of all trade-distorting measures through vigorous action (ibid. 2008, 4). Highly relevant raw materials for European industrial production are regularly reviewed in a list of critical raw materials. This list currently includes, for example, platinum and chromium. Roughly half of the global reserves of these two metals are located in South Africa, which naturally makes it a strategic target for Europe to secure a steady supply.

The time of clear-cut financial support from international financial institutions, in particular the World Bank, for explicit trade liberalization policies related to the extractive sector is gone, having peaked in the early to mid-1990s.[3] International financial institutions, however, still play a crucial role in the international economy of raw materials. They continue to provide funding for individual natural resource extraction projects and are often criticized for the conflicts these projects create as well as the weak protection they offer to those who face threats and restrictions for contesting such projects (Human Rights Watch 2015). Recent changes to the World Bank's Environmental and Social Framework, including its revised policy on indigenous peoples, have been criticized for lowering protection standards, weakening supervision and oversight, limiting access to information, and watering down implementation of the concept of free, prior, and informed consent for indigenous peoples (FPIC) (Gordon 2016; Gordon & Shakya 2016).

International rules and policies foster natural resource exploitation to allow for a free exchange of raw materials, agricultural products, and energy. International trade law supports this process and facilitates the use of natural resources to enable the trade of such products. International financial institutions provide loans to do so or even push for regulatory guarantees to access natural resources. Consumers worldwide rely on these resources for the increased consumption of commodities derived from them. The exploitation of natural resources as an element of the constantly increasing globalized trade and economy is, however, not the only way to manage natural resources. Local communities, NGOs, and relevant segments of the public at large may want to preserve natural resources and the environment, and protect against the negative (human rights) impacts of their exploitation. Often it is therefore necessary to harmonize the different objectives of natural resource management and development when it comes to the planning and implementation of individual projects.

3 See e.g. World Bank Project P007672 – Mining Sector Restructuring Project in Mexico in between 91–98. http://projects.worldbank.org/P007672/mining-sector-restructuring-project?lang=en&tab=overview

Disagreements about the objectives of natural resource development

Mining activities may lead to the pollution of rivers and air. Industrial agriculture may exhaust local water sources, depriving the local population of access to this essential resource. More generally, all types of natural resource exploitation discussed in this report result in a loss of land for the local population. The global growth-based capitalist economy that depends on an ever-increasing use of natural resources for the production of commodities to be consumed, thus, creates environmental degradation and resource depletion (Jorgenson & Clark 2009, 624). Not unsurprisingly, these negative impacts lead to resistance against a number of such projects, and conflicts may ensue where local demands by affected communities or civil society organizations working for the conservation of natural resources are not sufficiently met.

Material benefits are accrued by those countries and regions that consume the raw materials or the commodities manufactured from them. Those countries where extraction and exploitation take place also generate benefits through, inter alia, royalties and employment opportunities. Yet, the distribution of these benefits may become a source of conflict when corruption and cronyism divert benefits away from the general population, which is a regular problem in partial democracies. Most of the countries that provide the bulk of natural resources therefore bear the devastating consequences of their extraction and exploitation, shouldering specific environmental impacts, the division of communities, the disruption of social life, and the dispossession of land necessary for subsistence. Despite such negative impacts, governments and corporations pushing for natural resource exploitation paint their efforts as strategies to achieve progress.

In most of the extractive, energy-generating, and agricultural production projects studied for this report, local, national, and international actors revealed different perceptions about the types of development that the exploitation of natural resources should serve. Interpretations of the term oscillate between a market-based model of development, in which natural resource exploitation – in particular the extraction of raw materials as commodities, or for commodity production – is viewed as a way to foster economic growth and industrialization, which, in turn, can create wealth that will eventually trickle down to all members of society. A second, people-centered approach to development primarily focuses on the way in which extraction operates and the immediate impacts it may have on local populations and the environment.[4] This study does not pretend to capture the complexities of ongoing debates about combining sustainability with growth or the meaning of sustainable development in debates around food security, green growth, or climate justice. What is important to note here is that the terms «development» and «sustainable development» are used differently by different actors. For example, proponents of the current market-based

4 See e.g. UN Declaration on the Right to Development, UN Doc. A/RES/41/128 of 4 December 1986, which states in its Article 1: «The right to development is an inalienable right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.»

economic system of natural resource exploitation incorporate the concept of *sustainable* development, at least on paper. This can be seen, inter alia, in the use of the term as part of the G20 Action Plan on the 2030 Agenda for Sustainable Development, or loan agreements by the World Bank Group that relate to sustainable, rural, or local development.[5] At the same time, although the United Nations (UN) Sustainable Development Goals (SDGs) take a more people-centered approach, they also incorporate elements of a market-based, growth-oriented economy.[6] «The concept of sustainability has demonstrated an apparent power to unite disparate parties with divergent interests behind a common goal» (Rajak 2016, 932).

The open texture of the term «development» at the international level sets the context for contestation over the concrete meaning of the term in domestic contexts. For example, the Constitutional Court of South Africa had to decide about the potential negative environmental impacts of a proposed gas station situated above an aquifer that was supplying the local population with water. It stated that «the constitution recognizes the need for the protection of the environment while at the same time it recognizes the need for social and economic development. […] It envisages that environmental considerations will be balanced with socio-economic considerations through the ideal of sustainable development» (*Fuel Retailers Association of Southern Africa v. Director-General Environmental Management 2007*). Drawing inspiration from international documents, the court concluded that «economic development, social development and the protection of the environment are now considered pillars of sustainable development,» while «pure economic factors are no longer decisive» (ibid.). In India, the Supreme Court has dealt with mining activities that were potentially in conflict with the protection of scheduled tribes and forest dwellers. In its landmark Samatha Judgment about the leasing of tribal lands to private mining industries, the Supreme Court interpreted the term «development» on the basis of the UN Declaration on the Right to Development: «[I]t is its [India's] duty to formulate its policies, legislative or executive, to accord equal attention to the promotion of, and to protect the right to social, economic, civil and cultural rights of the people, in particular, the poor, the Dalits, and Tribes […]» (*Samatha v. State of Andhra Pradesh* 1997). Domestic courts, thus, have had to balance the different objectives placed in international texts on sustainable development in order to decide about the approval of actual domestic resource exploitation projects.

At the local level, individuals and communities often have their own visions for local development. As one community member born in 1955 who was affected by mining in Limpopo, South Africa, put it: «Since I can remember, mining has always been around as an issue. First, mining claimed to bring development, but the individual projects showed that this is not the case.» Local conceptions of development range from civil society actors advocating for a clear rejection of all extractive activities to proponents of a more just and fair implementation of natural resource

5 See the list of projects supported by the World Bank in relation to Mexico, in particular: P130623, P095510, and others.

6 2030 Agenda for Sustainable Development, Goal 8 on economic growth and trade; Goal 9 on industrialization.

projects that would effectively take their views and concerns into account. One South African NGO distinguishes between resource extraction projects based on the types of materials to be extracted. It generally rejects projects that seek to mine uranium, coal, gold, or diamonds, as it believes such resources are already extracted in sufficient quantities globally or alternatives exist to using these materials. It accepts, at least in principle, mining for raw materials that are necessary to produce relatively essential goods, such as copper, but emphasizes that it must be done in agreement with local communities' wishes.

Ideas about how projects are to be carried out and with what safeguards and benefits for locally affected people vary from context to context. For example, the South Africa-based network Mining Affected Communities United in Action (MACUA) and the Women Affected by Mining United in Action (WAMUA) released a People's Mining Charter in 2016 emphasizing that it is the right of the people, especially the occupiers of the land, to decide on the presence of mining activities or not. The Charter urges the South African government to respect and support the decisions made by communities for a *path of development* that is not driven by fossil fuel or raw material extraction (MACUA & WAMUA 2016, 1–2). The groups declare that they will deny consent to a company that «doesn't have a transparent community-driven process of negotiation which has at its core the principle of Free, Prior, and Informed Consent» (ibid. 2016, 3). When asked about specific demands regarding one platinum mine in Limpopo, one affected community member listed a number of concrete proposals relating to the provision of information prior to blasting, the allocation of alternative grazing land, and respect for cemeteries and culturally important sites. The community member concluded that, «[G]enerally it is about being consulted about the mine and how it is carried out.» Thus, locally affected people place great emphasis on participation in decision-making about the development of natural resources.

In sum, the challenge to define what sustainable development would look like in actual projects is shaped by processes at the international level. Even though the question of what form development should take is an inherently political question, it is often the domestic courts with recourse to texts written at the international level that have to determine what development means in concrete cases. It is noteworthy that – contrary to the general dominance of economic interests – both South Africa's and India's highest courts clearly advocate for an approach that relegates economic considerations to a second-order concern, or counts economic arguments as only one consideration among many. Although local conceptions of development vary, they generally place great emphasis on the participation of affected populations and civil society organizations in natural resource governance.

2.2 Shrinking space for civil society engagement

Strong liberal democracies are assumed to thrive on active civil engagement to foster political involvement in civic discussions, attendance of public meetings, and serving on local committees and in organizations (e.g., Putnam 1995). Even though civil society organizations may not always work for the common good, civil society

can shape political processes, successfully organize political participation, uncover corruption and human rights abuses, and demand accountability. In more free and established states, there are clearly defined civil and political rights that are based on the rule of law and a capacity of the state to defend these rights. In this context, there is an effective legal framework as well as state protection for civil society organizations (Van der Borgh & Terwindt 2012, 1069). Civil society is recognized as playing a political role and operating in the public sphere, which can be defined as «the non-legislative, extra-judicial, public space in which societal differences, social problems, public policy, government action and matters of community and cultural identity are developed and debated» (McCain & Fleming 2004, 55, in: Edwards 2009, 64). Civil society is generally viewed as being autonomous from family, state, and market actors. It is understood to rely on voluntaristic means of action and positively contribute to society through the nourishing of social norms and the pursuit of societal goals (Edwards 2004). Even though business increasingly makes claims of being part of civil society and usurps its place in a number of institutions (Martens 2016, 21), the definition of civil society used in this study excludes for-profit organizations.

Recognition of the key role that civil society plays is, however, not limited to democracies. The SDGs and the Busan Partnership for Effective Development Co-operation highlight civil society's important role and are signed by a vast number of countries. In fact, widely accepted international human rights norms protect the activities of civil society actors through the freedom of expression, association, and peaceful assembly and offer further legal guarantees for the right to a fair trial if a person making use of the above rights is prosecuted (e.g., International Covenant on Civil and Political Rights).

Despite the broad acceptance of civil society's positive contributions, there have been a number of restrictions imposed by governments on civil society in recent decades, frequently in the name of security concerns. For example, after September 11, 2001, anti-terrorism legislation in the United States and elsewhere created hurdles for the registration and funding of civil society organizations (Rutzen 2015, 29). In a number of countries, overly broad definitions of terrorism have led to criminal prosecutions of legitimate protesters (World Movement for Democracy 2012). In addition, alleged Western influence on local democracy groups through support by foreign funders and organizations to local NGOs has been seen as imposing foreign conceptions of a good democratic society (Rutzen 2015, 29–30), especially after the so-called color revolutions in Eastern Europe in the early 2000s. This led some authoritarian states such as Russia, Azerbaijan, Uzbekistan, and Turkmenistan to develop legislation to curb and control foreign funding to civil society organizations. This trend continued, notably, through the so-called Arab Spring (Carothers & Brechenmacher 2014, 26), which led countries in the Middle East and North Africa region to impose restrictions on civil society that were accepted by additional states as a welcome opportunity to follow suit or to tighten their already-existing restrictions on freedom of assembly and association.[7]

7 E.g. restriction imposed by the Algerian national assembly in 2012.

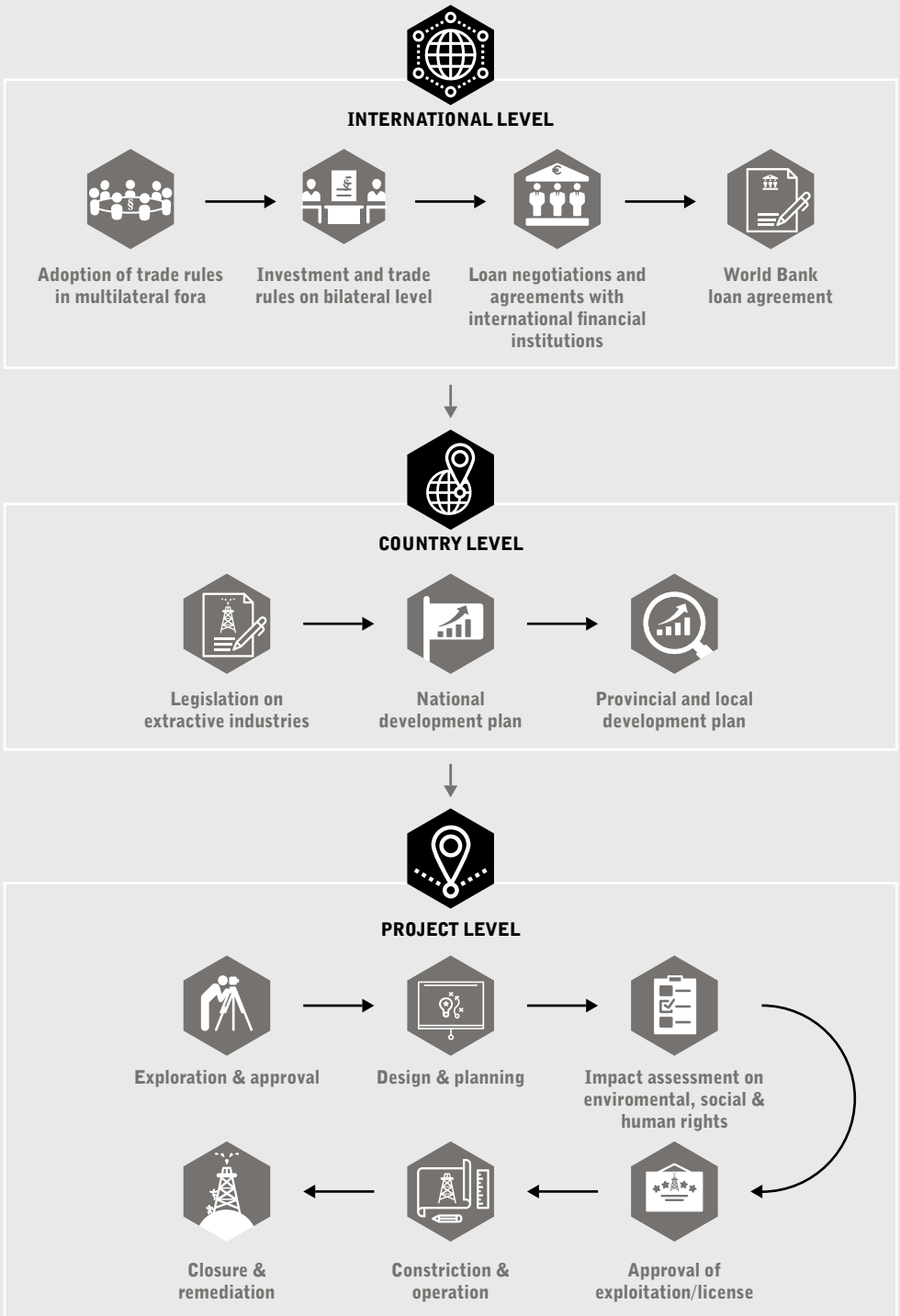
All across the world, civil society is under pressure – in both authoritarian and democratic states. These developments have led to a global debate about the «shrinking space» or «closing space» of civil society (Unmüßig 2016; for a critical assessment: Hayes et al. 2017). The concept of «space» moves attention away from single types of pressure, such as a narrow focus on the freezing of funding, and thus serves to more fully capture the wide range of pressures and restrictions experienced by civil society organizations. In addition, it enables studying the interaction between – and possible sequences of – different forms of restrictions, such as physical harassment, initiation of criminal investigations, surveillance, defamation, burdensome registration requirements for NGOs, the stricter regulation of foreign funding for NGOs, or the restriction on demonstrations. The focus, thus, lies on space and the two notions of «civic space» and «space for civil society» are used interchangeable in this report. Space, then, denotes the possibility and capacity for civil society actors to function in non-governmental or community-based organizations and to perform civil society's key tasks (Van der Borgh & Terwindt 2014, 35).

A caveat is needed, though, when speaking about «shrinking» space. In some countries, post-dictatorship situations have actually led to more space for the vast majority of civil society actors. For example, in Indonesia, civil society space is actually considered to be more open in comparison to the Suharto dictatorship (Van der Borgh & Terwindt 2014). At the same time, more active participation by civil society can also be the reason for increased pressure to silence unwelcome voices. Attention to the topic may also have led to more documentation of restrictions on civil society.

Participation in natural resource governance

Space for civil society in the natural resource arena is predicated on the notion that civil society is supposed to have the opportunity to participate in decision-making about natural resource governance. Indeed, laws regulating resource exploitation often explicitly require public consultation before a project is officially approved. However, some scholars argue that the extraction of natural resources is accompanied by the recognition of a minimum version of (indigenous) rights and systems of public consultation to foster «governability of extraction» and «legitimacy of the neoliberal development model» (Anthias & Radcliffe 2015, 261). Whereas civil society is allowed to participate in the margins, decision-making in natural resource governance at both the global and domestic levels is mostly determined by market forces prescribing where, and for what purpose, land should be used and materials should be extracted, leaving little room for meaningful influence from civil society. A closer look at the stages of natural resource development shows how civil society participation is restricted. Based on the exemplary scheme below, participation is, in principle, possible at all levels in the process of natural resource development, beginning at the international level, through relevant domestic legislation, down to project-related decisions.

Figure 1: The case of mining
Schematic development of a natural resource extraction project



Source: Own chart.

Civil society actors attempt to use these participation opportunities to different degrees. Globally operating NGOs try to intervene in international fora, as in the civil society engagement group at the G20, for example. Yet, although civil society has become increasingly visible at the international level, the effectiveness of interventions is limited because there are no institutionalized guarantees that civil society voices will be taken into account. Other organizations and movements have therefore founded international alliances and organized protests criticizing international decision-making, as has happened in the past with public resistance against WTO negotiation rounds in Seattle and Cancún.

At the same time, national NGOs aim to influence resource governance in their respective home countries by submitting recommendations and reports during the elaboration of national and regional development plans or the drafting of legislation regulating the exploitation of natural resources. Participatory mechanisms are often provided in such processes, but taking civil society perspectives into account is generally not mandatory. In some cases, NGOs do not even get access to relevant provisions. This is so, for example, in negotiations on bilateral investment treaties, which curtail a government's future freedom to regulate natural resource exploitation.

Civil society tends to have the possibility to get actively involved in decision-making over natural resource exploitation only during the implementation of individual projects, since that is the moment in which the population frequently experiences direct negative impacts. Often, civil society participation mechanisms are only established in the final stages of project implementation and are generally flawed, in that they fail to effectively recognize and respect local conceptions of development.

Increasingly, civil society actors cooperate and strategically build so-called transnational advocacy networks (Keck & Sikkink 1998). National NGOs or national branches of internationally operating NGOs function as broker organizations to connect local communities and grassroots organizations with international actors or translate their local concerns into global demands, and vice versa.

Pressures on civil society in the natural resource arena

Following the approach developed by Van der Borgh and Terwindt (2014), this study takes as its point of departure the understanding that patterns in pressures on civil society are most usefully analyzed within a particular context. This study's focus on natural resource development corresponds to one of the «arenas of contention» identified by Van der Borgh and Terwindt as being a key area in which civic space is under pressure in partial democracies. When social movements, NGOs, and affected communities attempt to influence natural resource governance, they often experience a strong negative reaction from political and corporate actors defending their own interests.

Recent reports have provided insights into prevalent forms of repression against communities and NGOs resisting or criticizing natural resource exploitation. Most striking is the high rate of attacks on physical integrity, including lethal attacks (see as early as 2007: Jilani 2007, 13). The year 2017 is on course to be the deadliest year for land rights defenders (Taylor 2017), while three times as many people were

killed in 2012 than 10 years before (Global Witness 2014, 10). This high number of attacks is accompanied by nearly complete impunity. According to the statistics of Global Witness, just 10 perpetrators are known to have been tried, convicted, and punished for lethal attacks on environmental and land defenders between 2002 and 2013, around 1% of the overall number of known killings (ibid. 2014, 5). The Philippines, India, and Mexico are among the 10 states with the highest rates of killing in 2015 (Global Witness 2016, 9). In addition, research has shown that governments and business frequently stigmatize critics of resource exploitation projects as being anti-development. Individuals resisting natural resource exploitation or fighting for the conservation of the environment often face police raids, wrongful arrests, fines, and imprisonment (Global Witness 2015, 13). The use of anti-terrorism laws against such actors is also reported to be a common practice, with particular repercussions on the right to freedom of assembly (CIEL 2016, 42–45; Kiai 2015a, 14).

Hand in hand with the emphasis on civil and political freedoms that foster the associational life of civil society, liberalism also advocates for economic freedoms, liberalization of markets, and the protection of private property to foster economic growth. Resource exploitation projects reveal the tension between these two aspects of liberalism, condensed in the contestation over the term «development,» as explained above. Recognition of the freedoms for civil society in national and international norms and standards is at odds with the pressures faced by those actors who criticize extractive projects. Also, too much emphasis on economic freedoms and the invisible hand of the market tends to overlook that participation of civil society actors depends on their socio-economic backgrounds and is not free from power imbalances (Hyden 1997, 12). Meaningful participation not only requires being free from pressure and being able to use one's relevant civil and political rights to start an organization and express an opinion. It also requires a real place at the table with the ability to influence decision-making in order to realize economic, social, and cultural rights. Without a real place at the table, the space for civil society can deteriorate into «fake space» (Van der Borgh & Terwindt 2014). The study of civil society space should, therefore, not only focus on the pressures faced, but also include an analysis of civil society's ability to use that space to actually obtain a real voice and influence change.

The natural resource arena, thus, reveals a particular «political opportunity structure» (Tilly & Tarrow 2007, 57) that shapes the power relations between the main protagonists and institutions involved in organizational claim-making, and also influences the possibility to find allies. How civil society responds to the prioritization of economic considerations in decision-making as well as how civil society responds to the mentioned restrictions on political and civil rights, thus, becomes part of the political contestation over the desired development model for natural resources. Access to the different institutions holding power in the natural resource arena is therefore one element required to achieve change. However, «[T]he political elites must also be receptive to the claims being made and willing to change policy accordingly» (Hilson 2002, 242). Changing elements of the political opportunity structure or the «rules of the game» (Van der Borgh & Terwindt 2014, 29) may therefore become necessary to create real space for civil society actors.

PART 2

COUNTRY COMPARISON OF CLAIMS TO NATURAL RESOURCES – INDUSTRY, CONTESTATION, SHRINKING SPACE

Having seen how liberalism, the global trade in raw and materials, and the easy access of business interests to decision-making about natural resource extraction shape the rules for public participation and natural resource development, the present part introduces four different contexts in which civil society is put under pressure as communities and NGOs try to have their voices heard in decision-making about resource-dependent projects in South Africa, India, Mexico, and the Philippines.

These countries share a number of political and geographic commonalities as well as a past liberalization of the extraction, use, and trade of natural resources. First and typical for partial democracies, the military as well as paramilitary units play an important role in each of these countries. In the Philippines, this is related in particular to ongoing armed conflicts in certain parts of the country, above all in Mindanao. In Mexico, the «war on drugs» has led to the militarization of the state apparatus. In India, the military enjoys special powers in locations defined by law as «disturbed areas,» which currently include Kashmir and parts of the northeast. Paramilitary units such as the Central Reserve Police Force are also currently combating a number of insurgency movements, including the Naxalites, which are very active in some of the regions where natural resources are located, such as Odisha. Among the four countries examined, South Africa is an exception to the important role the military plays for state governance. However, South Africa's national policies have increasingly transformed the country into what commentators have begun to call a police state, with direct impacts on civil society freedoms.

In line with another typical feature of partial democracies, governance in each of these countries is characterized by considerable corruption.[8] Yet, in terms of general state governance – measured through respect for the rule of law, stability of democratic institutions, possibilities for political participation, and implementation of basic economic principles – the four countries are closely comparable, according to the Bertelsmann Transformation Index, which compares 129 «developing and transition countries.»[9] Although South Africa and India respectively rank 26th and 28th, and the Philippines and Mexico only 38th and 41st, based on data for the year 2016, all four countries are part of the top third of the overall number of countries analyzed (Bertelsmann Stiftung 2017), indicating a general climate of stability and respect for core principles of democratic and economic governance.

The countries are also relatively comparable in relation to the distribution of wealth among the general population, apart from South Africa, which has an

8 A low score on the corruption perception index indicates more perceived corruption: South Africa: 45/100; India: 40/100; Philippines: 35/100; Mexico: 30/100. In comparison, Scandinavian countries score close to 90.

9 «The Bertelsmann Stiftung's Transformation Index (BSTI) analyzes and evaluates the quality of democracy, a market economy and political management in 129 developing and transition countries. It measures successes and setbacks on the path toward a democracy, based on the rule of law and a socially responsible market economy.» www.bti-project.org/en/index [accessed 26 October 2017].

exceptionally high imbalance.[10] The importance of resource development for national income is also comparable in the four countries, and more pronounced than in most European states, but less important than in smaller African states that depend on the exploitation of their natural resources to an even greater degree.[11] Still, all four countries follow the economic logic of extractivism, generating national income through the extraction of raw materials and resource rents based on an increased global demand. The countries differ, though, in how they put this logic into practice, be it as part of an ongoing liberalization policy or following a neo-extractivist policy with an emphasis on national development (for the difference between liberalization and neo-extractivist policies, see Burchardt & Dietz 2014, 469–470). India, for example, increasingly produces for domestic consumption and less for export as part of the global trade of natural resources. India and South Africa maintain a cautious approach to investment treaties and free trade agreements in order to protect their right to regulate (Schlemmer 2016, 190–191; Ranjan & Anand forthcoming, 34–37), whereas Mexico and the Philippines continue to conclude agreements without such visible emphasis. Worldwide, Mexico is the second country with most trade agreements, after Chile.[12] India and South Africa possess a considerable domestic processing industry, allowing for the export of secondary commodities and increased capture of the benefits generated through the processing industry (Schaffartzik et al. 2016, 106; Behrens et al. 2007, 6).

In each country, the research zooms in on a particular industry sector and province or state. In India and South Africa, the focus is on the extraction of metals and minerals in two regions where huge deposits are lying beneath the soil: Odisha in India and Limpopo in South Africa. In Mexico, emphasis lies on the energy sector and, in particular, the wind parks in Oaxaca. In the Philippines, the analysis focuses on agricultural plantations and their impact on granting land rights to farmers in Mindanao.

Each country chapter thus serves as an introduction to the political, economic, and legal conditions that are relevant for the development and governance of natural resources in particular projects, including the ways in which civil society organizations and affected communities are involved. The presentation of the decision-making trajectory in specific cases allows for understanding the sequence of events as well as the context for the relations between civil society and proponents of extractive projects and policies.

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10 The GINI coefficient in these four countries varies between 33.90 for India, 43.04 for the Philippines, 48.07 for Mexico and a high of 63.38 for South Africa in 2012. Data retrieved from www.indexmundi.com based on World Bank statistics. The more equal a country's income distribution, the lower its Gini index.

11 In India, natural resource extraction contributes 1.9% to the national gross domestic product (GDP); 2.3% in Mexico; 1.6% in the Philippines; and 4.2% in South Africa, based on data provided by World Bank on contribution of natural resource rents to national GDP. http://data.worldbank.org/indicator/NY.GDP.TOTL.RT.ZS

12 It has 12 free trade agreements with 44 different countries. www.ciltec.com.mx/es/comercio-exterior/exportaciones-de-mexico

3 Indian forests: Enter companies exit forest dwellers

Since the beginning of the 1990s, national and state policies for economic development in India have changed dramatically, fostering economic development in line with the structural adjustment paradigm advocated by the World Bank. In addition to general policies subjecting the Indian economy to the imperatives of a globalized free market, the federal and state governments have also introduced sector-specific laws and mechanisms that have led to the commodification of natural resources, with iron ore and coal at the forefront of India's extractive industry. Over time, the negative impacts of this trend have become increasingly visible, as has public criticism and resistance in response to them. Social movements in India have registered a number of successes in bringing about laws that aim to protect tribal and other forest dweller communities, most of which are affected by resource extraction in remote areas, as well as from the negative impacts in the environment due to increased resource extraction. To date, these different laws often compete with each other when it comes to their implementation.

The current Indian government under President Narenda Modi seems to be inclined to foster economic development – understood mainly as growth – without paying too much attention to the protection of the country's waterways, forests, or the people who depend on these resources to survive. Civil society actors who advocate for a different understanding of development frequently face government scrutiny and surveillance. They are often subjected to tight oversight and control under the Foreign Contributions Regulation Act and publicly discredited as backwards and anti-development or as state-threatening, militant Maoists.

3.1 India's economic turn since 1991

> «The mining that is taking place in the forest areas [is] threatening the livelihood and the survival of many tribes. It is through enlightened development policies that we can resolve such dilemmas of development. One pre-condition for the success of developmental projects in our extensive tribal areas is that we should take into confidence the tribals and their representatives, explain the benefits and consult them in regard to the protection of their livelihood and their unique cultures.»
>
> *Former President Shri K. R. Narayanan (Narayanan 2001)*

In 1991, India introduced a new economic policy in order to cope with a severe debt crisis. This meant accepting funds from the International Monetary Fund and the World Bank as part of these institutions' then-prevalent structural adjustment program. In India, as elsewhere, the structural adjustment program aimed at liberalizing and privatizing the economy and promoting a shift from state to market. It included cutting public expenditures, privatizing state-owned enterprises, maintaining a low rate of inflation and price stability, shrinking the size of public bureaucracy, increasing exports, and deregulating international trade and financial markets (Abouharb & Cingranelli 2007, 15).

Subsequent to the country's shift toward economic liberalization, a comprehensive National Mineral Policy was announced for the first time in India, which encouraged private investment in mining and led to amendments to the Mining and Minerals Development Act (MMDA) in January 1994 (Ministry of Mines India 2016, para. 3.3.2). The Ministry of Mines has pointed out that «the amendments sought to simplify the procedure for grant of mineral concession so as to attract large investment through private sector participation, including foreign direct investment» (ibid.). As a consequence, a number of minerals that were previously reserved for state exploration were opened up to the general market. In addition, rules on foreign ownership were relaxed in the mining sector, permitting 50% foreign ownership in corporations engaged in resource extraction. The latest amendment to the MMDA in 2016 provided for a new type of mining license that combines exploration and exploitation licenses to speed up administrative processes and also extends the length of lease periods from 30 years to 50 years.[13] On the basis of these amendments, India has managed to increase natural resource extraction over the past years, with extraction rates of iron ore and (bituminous) coal tripling in the last 25 years (British Geological Society 2017).

In September 2015, the current Indian administration under President Modi also set up a project monitoring group (PMG) at the office of the Prime Minister for fast-tracking approvals and the expeditious commissioning of large projects (public, private, or mixed public–private partnerships). The projects considered by PMG include petroleum, natural gas, and coal projects, as well as mines. A project proponent who encounters bottlenecks or delays in obtaining approvals from public bodies can upload any issue – including suggestions for policy intervention – in an online portal for swift resolution. In addition, foreign direct investments are explicitly promoted, and the PMG helps foreign actors to make large investments in India by facilitating approvals and clearances and by providing the necessary support during the implementation of specific projects (Prime Minster of India 2017).

3.2 Odisha: Rich in minerals and indigenous peoples living on top of them

Odisha is part of the «red belt» of India, characterized by a high presence of militant Maoist groups, also called Naxalites. Naxalism began as a peasant movement in

13 Mines and Minerals (Development and Regulation) Amendment Bill, No. 72 of 2016.

1967 in Naxalbari, in West Bengal, demanding radical land reform (CSE [Center for Science and Environment] 2008, 20). After the militant movement was driven out of West Bengal, it settled in heavily forested areas dominated by tribal peoples, among others, in the Indian states of Odisha, Bihar, Jharkhand, and Chhattisgarh, where their focus on land reform morphed into demands for tribal self-determination and control over local resources (CSE 2008, 20). The increase in mining activities and environmental problems that followed India's «New Economic Policy» became a significant driver of the conflict between Naxalites and the state. Since 2009, the government has increased its efforts to combat the Naxalites, including in Odisha (Falkenhagen 2013, 22).

In comparison to the whole of India, Odisha is home to the largest number of tribal peoples, comprising 63 tribes and an overall tribal population of 9.3 million (Sethy 2016, 77). As in the rest of India, where 90% of India's coal and 80% of its other minerals are found in tribal areas (CSE 2008, 9), also in Odisha, the forest lands that provide a home to the tribal people largely overlap with mineral-rich areas (Rights and Resource Initiative Vasundhara 2015; Directorate of Geology 2008).

Among the minerals located in Odisha, 86% is coal, 7% iron ore (necessary for steel production), 2% bauxite (necessary for aluminum production), 2% lime stone, and 3% others, which make up a significant portion of India's overall deposits of these materials (Government of Odisha 2015, 4–32). According to the website of the Directorate of Mines of the Government of Odisha, there were a total of 603 mines in the state between 2014 and 2015. Odisha accounts for 10% of the country's total capacity of steel production and, based on output, Odisha is number one in India regarding aluminum production (ibid. 2015, 1–5). Of the four big plants that produce aluminum in India, two are located in Odisha. It is noteworthy that a high number of small and medium-sized companies are engaged in resource extraction in Odisha, and the state-owned Orissa Mining Corporation plays a major role in individual projects and joint ventures with private entities (ibid. 2015, 4–36, 1–5).

Similar to the federal government, Odisha also presents itself as a mining hub and held its latest investor conclave in November 2016, in which it offered a range of incentives to encourage investment in the industrialization of the state. The Directorate of Mines in Odisha calls the state «the hottest destination for investors» (Directorate of Mines Odisha, s.a.). This systemic support for investment in resource exploitation is also extended in individual cases, as the following case study shows.

The POSCO steel project and the communities who successfully resisted, only to face a new investor

In 2005, the government of Odisha and South Korean investor POSCO concluded an agreement for an integrated steel project, including a plant, a port, and mining concessions. The government promised to assist POSCO «in

obtaining all clearances including forest and environment clearance,» among other support (Government of Orissa 2005, 9). The locally affected population in Odisha only heard about the threat in the local news, the day after the agreement had been concluded. Communities organized in an anti-POSCO movement and resisted the construction of the project, demanding their concerns be taken seriously. When community members re-entered the land, the government and the company initiated criminal and civil proceedings against them for trespassing. Forceful acquisition of the land took place without respecting the legal procedures protecting their rights as forest dwellers. In 2017, POSCO declared that it would abandon the project, in part due to the strong network of civil society resisting its plans. However, the communal forestland expropriated for the purpose of the POSCO project was not returned to the 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 (Amnesty International 2017b; The Telegraph India 2017).

3.3 The standard: Consent from all forest dwellers is needed for extraction projects

Hand in hand with increased efforts for natural resource extraction, mining activities have also increasingly been subject to laws that incorporate protection mechanisms for the affected local population and the environment. The aforementioned MMDA of 2016, for example, includes a new institution called the District Mineral Foundation, which, according to its objective, should work for the interests and benefits of persons and areas affected by mining-related operations. The foundation is financed from the royalties paid by operating companies. In theory, such a foundation would support affected local communities and should improve their living conditions. In practice, the few experiences so far reveal that, although positive effects have been noted, the views of those affected have not been sufficiently integrated into the decision-making, particularly when it comes to identifying beneficiaries and the disbursement of funds for the benefit of the local people (CSE 2017). Protection, as envisaged in further laws, often focuses on participation mechanisms. Although the means of participation differ across legislation, it serves the same goal: to assert and respect local concerns for – and conceptions of – development, as exemplified in the following text box on relevant legislation.

Legislation relevant for mining activities aimed at protecting affected communities

Section 4, The Provisions of the Panchayats (Extension to the Scheduled Areas) Act, 1996
(e) every **Gram Sabha (traditional council) shall approve** of the plans, programs and projects for social and economic development before such plans, programs and projects are taken up for implementation.

Section 5 d, Forest Rights Act
The holders of any forest rights, Gram Sabha and village level institutions in areas where there are holders of any forest right under this Act, are empowered to [...] ensure that the decisions taken in the Gram Sabha to **regulate access to community forest resources** and stop any activity which adversely affects the wild animals, forest and the biodiversity are complied with.

Section 4 (1) & 5, Land Acquisition Act
Whenever the [...] Government intends to acquire land for a public purpose, it shall consult the concerned Panchayat, Municipality or Municipal Corporation [...] in the affected area and carry out a Social Impact Assessment study in consultation with them. [...] Whenever a Social Impact Assessment is required to be prepared [...] the [...] Government shall ensure that a **public hearing** is held at the affected area, after giving adequate publicity about the date, time and venue for the public hearing, to ascertain the views of the affected families to be recorded and included in the Social Impact Assessment Report.

For some communities that are holders of forest rights, such as scheduled tribes protected under India's Constitution and traditional forest dwellers, consent is thus the norm. However, in order to be properly implemented, the above norms need to be transformed into state legislation through accompanying rules. Not all states in India have adopted these rules for the Panchayat Extension to the Scheduled Areas Act, essentially rendering it irrelevant in many parts of the country. For other affected populations, various legal provisions require that development plans, programs, and projects include consultations with affected individuals and communities. In addition, Section 2 (2) of the Land Acquisition Act stipulates that land can only be acquired with approval of 70% of the land owners for public-private partnership projects and 80% for private projects. Since the Land Acquisition Act entered into force on January 1, 2014, the government has proposed changes to ease land acquisition and, despite parliamentary opposition, passed these changes through

ordinances.[14] According to the changes to date, it is no longer necessary to obtain consent or conduct a social impact assessment if the land is acquired for national security or defense purposes, or also, notably, for rural infrastructure projects or industrial corridors.

Resistance against mining projects in Odisha is widespread. Courts are often the only ally of the affected people, as ministries and government departments generally favor investors over all other interests. One such case concerns a project of the Sterling company (a subsidiary of the British mining company Vedanta), which has affected several tribes in the Niyamgiri hills in Odisha. After several rounds of back and forth with ministries and the courts, India's Supreme Court finally decided in 2014 that the traditional councils (Gram Sabhas) of the villages affected by the project had not been properly consulted. It ordered that the environmental issues under question be placed before the Gram Sabha and that proceedings be attended by a judicial officer (*Orissa Mining Corporation v. Ministry of Environment and Forests* 2013, para. 68). After the court decision, 12 Gram Sabhas held meetings in which resolutions were passed unanimously in favor of preserving the Niyamgiri hills and against the proposed bauxite mining project. On the basis of these resolutions, the Ministry of Environment and Forests rejected Sterling's request for a grant of forest clearance in January 2014 (Khanna 2015, 31).

If consultations are not taking place properly and resources are insufficient to reach out to courts, communities organize resistance, as seen in the POSCO case. Communities are inventive and reach out to their allies to put international pressure on companies, they organize blockades to deny access to relevant sites, and they start political campaigns to influence the competent government authorities. Often, though, they face pressures once this resistance becomes visible and there is a real risk of derailing project implementation.

14 Initial government proposals were met with fierce opposition and the ruling Bharatiya Janata Party was not able to pass the relevant bill. However, the government was able to implement the amendments through ordinances. The president promulgated an Amendment Ordinance in December 2014 and has renewed this ordinance ever since.

4 Mexico's energy: A tale of threats, intimidation, and dispossession of indigenous peoples

The development of sustainable energy sources, including wind energy, has been widely touted as a great leap forward in both the Global North and Global South. The reduction of carbon emissions and the loosening grip of coal and petroleum[15] are certainly positive advances, but in Mexico, this progress has come at a significant price. The increased exploitation of natural resources for energy purposes has led to the conversion of land use and, thus, opposition by local communities. This, in turn, has led to an increase in threats, killings, physical aggression, arbitrary detention, and criminal investigations, particularly against those defending land rights and the environment (Centro Mexicano de Derecho Ambiental 2015, 9).

4.1 Opening the Mexican market to foreign investment

Since the early 1990s, Mexico has increasingly adopted an economy based on free trade. Mexico's Foreign Investment Law of 1973 completely restricted industries such as oil, certain mining activities, electricity, and rail transport to state ownership. In 1993, a new Foreign Investment Law removed almost all of these restrictions, allowing foreigners to invest in industrial, commercial, and hotel development along Mexico's coast and borderlines (Prida & Foeth 2010, 301; Aguilar Molinar 2011, 278). Still, some industries such as petroleum, basic petrochemicals, the generation of electricity, nuclear energy, and radioactive minerals remained the exclusive domain of the Mexican state. A prime example of further liberalization is the energy market being opened to private investment. In December 2013, a constitutional energy reform came into effect and an accompanying set of implementing legislations, including a package of laws governing the Mexican energy industry, were passed on August 11, 2014. The reforms focused primarily on eliminating state monopolies and opening Mexico's energy sector to private investment. The government maintained ownership over petroleum and hydrocarbon resources, but the law allowed the state to sign contracts with private actors and ensure private investment through

15 At the same time, Mexico continues to be dependent on oil and gas; for a map of oil and gas lines, see https://mx.boell.org/es/2017/07/26/ductos-por-donde-circulan-los-hidrocarburos-en-mexico

production-sharing, profit-sharing, and licensing mechanisms (Centro de Información sobre Empresas y Derechos Humanos 2016, 8–9).

Mexico's 2014 Hydrocarbon Law and Electric Industry Law both categorize energy development as an issue of public and national interest, thereby placing the exploitation of land for energy purposes above any other form of activity that requires surface or subsoil use, such as agriculture (Brown 2014). According to the new laws, project developers must inform both the property owner (or occupier) and the Mexican Energy Secretary of their proposed plans for energy development. The energy company can then negotiate with the landowner to determine whether the land will be bought, leased, or subject to temporary use, and how much the owner will receive in exchange.[16]

4.2 Renewable energy and the arrival of wind parks in Oaxaca

The Mexican state of Oaxaca has become central in the development of clean energy, as the Istmo de Tehuantepec region in Oaxaca is one of the zones with the most potential for wind energy in the world. Its winds have been recognized for exceeding global averages for speed, for being relatively stable, and for blowing on average a high percentage of hours per year (Juárez-Hernández & León 2014). The Mexican government has actively supported the development of wind parks in Oaxaca (Wilson Center 2016). The director of the federal energy company, CFE, advertised the wind parks with the message that they would turn «unproductive land» into energy (Gerber 2013). Together with the Institute of Electricity Investigation, the Mexican government organized international meetings to attract transnational wind companies and investors.[17] From the beginning, foreign investors were viewed as being essential to the exploitation of wind energy in Oaxaca. Private companies have thus been at the forefront of wind park development, such as Iberdrola, Acciona, Gamesa, Eyra, and Renovalia from Spain, as well as EDF (Electricité de France) from France, and Enel from Italy. United in the Mexican Wind Power Association, these companies have lobbied the government for favorable regulatory measures to ensure their projects' profitability (Juárez-Hernández & León 2014).

The wind park companies have received financial contributions from the World Bank, the Inter-American Development Bank (IADB), the EU-supported Latin American Investment Facility, and from export credit agencies (Lehmann 2015). For example, the Danish export credit agency supported one of the wind parks in order to facilitate involvement of the Danish turbine supplier Vestas (Critchley 2016). In addition, some of the renewable energy projects (wind parks, solar panels, and

16 Despite Mexican government assurances to the contrary, the law facilitates the expropriation of land by private companies. The parties have a period of 180 days within which to agree to terms for land cession and, if an agreement is not reached within that six month allotment, the project developer can request that a federal judge legally force the cession of land or that the Agriculture Minister intervenes to force an agreement.

17 Coloquios Internacionales sobre Oportunidades para el Desarrollo Eoloeléctrico del Corredor Eólico del Istmo de Tehuantepec in 2000, 2001, 2002 and 2004.

hydro-electric dams) in Oaxaca have been run as part of the UN-based Clean Development Mechanism, which allows developers to receive emission credits that, in turn, can be traded (Gerber 2013). These credits made some of the earlier wind parks in Oaxaca economically viable (Wilson Center 2016).

Wind exploitation in Oaxaca mainly follows the «self-supply model,» in which wind parks produce energy exclusively for specific corporate customers, such as Coca-Cola, Walmart, or the Mexican multinational food company Bimbo. For the clients, this model has the advantage of securing low energy prices, while profiting from the financial benefits of «clean energy» (Navarro & Bessi 2016). This system does not benefit local indigenous peoples and farmers. On the contrary, energy prices for ordinary consumers have drastically increased, leading to public protests (Thomas 2016). In the very localities where wind parks are installed, some houses actually have no access to electricity. Most of the investments go toward the purchase of turbines, which are made by companies from Denmark, the United States, and Spain (Juárez-Hernández & León 2014). Only a negligible percentage goes toward rent payments to the landowning community members (Gerber 2013). In a constitutional complaint in 2015, some of the international companies even refused to pay the relevant municipal taxes (Lehmann 2016, 249).

Thus, although those leasing their lands are happy to obtain the rents, the wind parks have not met the high expectations that they would benefit the entire local population, including indigenous peoples, who principally live off of agriculture and fishery (Wilson Center 2016). Although the construction phase of a wind park generates jobs, these positions last only for one or two years. Afterwards, only a few well-educated people are needed for the maintenance of the turbines. Despite the presence of wind parks in an area, poverty levels often remain the same or even deteriorate after the parks' establishment. Because the government had reached out to big investors, community wind projects were made impossible due to the priority given to attracting private capital (Juárez-Hernández & León 2014). Such projects would have enabled the local population to share in the benefits of the wind parks. In addition to the lack of benefits, some community members have also voiced concerns about the noise of the turbines and the parks' impact on aquifers, which could influence local fisheries and livestock. Ideally, such worries would be heard in public consultations.

4.3 Lack or inadequacy of consultations in many of the wind parks

The Mexican legal framework provides for numerous ways to include affected communities in decision-making about the development of natural resources. For example, since the 2003 amendment, the Law on Planning emphasizes the importance of the democratic participation of various social groups and indigenous communities (Article 1). Since 2011, Mexico's Constitution has specifically recognized the right to consultation (not consent) for its indigenous peoples and those communities that are «comparable» to indigenous communities in the elaboration of national, state, or municipal development plans and the right to suggest recommendations and

proposals (Article 2). A 2003 law recognizes that the state should consult indigenous communities «whenever it issues legal reforms, administrative acts, or development programs or projects which significantly impact their way of life and the environment» (*Ley de la Comisión Nacional para el desarrollo de los pueblos indígenas* Article 3 N. VI.). Mexico's constitutional reform and new legislation on its energy transition also included changes to facilitate civil society participation. According to the Electric Industry Law, the Energy Secretary needs to consult with any indigenous groups in the area in order to protect their rights.

Project developers are further required to submit a social impact assessment to Mexico's Energy Ministry, which should contain the identification, characterization, and cost of the potential social impacts of the project, as well as proposals for mitigating those impacts (Article 120, Chapter II of the Electrical Industry Law). The Secretary will then release a response with corresponding recommendations. The law imposes an economic sanction on any company that proceeds with construction before receiving a positive response from the Secretary with respect to the social impact assessment.

Oaxaca consists predominantly of communally held land. The trend to break down such «social property» into privatized land titles was pushed through successfully in other states in Mexico, but not so in Oaxaca (Dunlap 2017, 8). Social property in Oaxaca mostly consists of «agrarian communities.» This means that decisions about changes in the use of the land should be taken in assemblies. The lease of land parcels to wind companies, however, is often negotiated with individual landowners or the president of the community. In some of the wind park projects, communities have challenged such leases or the lack of proper indigenous consultations in legal proceedings.

In other cases, indigenous communities have challenged the lack of consultations on the basis of International Labour Organization (ILO) Convention No. 169 and the Mexican Constitution. For example, in 2011, the international consortium MareñaRenovables planned a wind park in San Dionisio del Mar. In the environmental and social management report that was submitted to the IADB, the consortium claimed that it had consulted the indigenous people and that there had been no opposition (Juárez-Hernández & León 2014). The indigenous community claimed, however, that, contrary to ILO Convention No. 169, no consultation had taken place and that they did not agree with the use of their communal land for the wind park. In December 2012, a judge suspended the wind park project «San Dionisio» after the communities filed a legal claim stating that their right to have a consultation on the basis of ILO Convention No. 169 and Article 27 of the Constitution had been violated (Ramos 2016). After months of physical confrontations on the streets between project opponents and the police, combined with campaigning, the consortium withdrew its plans and decided to move to another area in Oaxaca, Juchitán (Gerber 2013).

Upon the proposal of this new project in 2014, the Mexican Ministry of Energy initiated a consultation. This process lasted nine months and was followed closely,

as it was the first of its kind.[18] A «technical committee» developed the guidelines for the procedure and was in charge of organizing the informative events and subsequent debates. They invited academics to provide information about environmental impacts and, during one of the sessions, the company was invited to give a presentation about the «economic impacts and benefits» of the project (Friede & Lehmann 2016). The sessions were further attended by the Secretary of Energy, representatives of the Oaxaca government, the IADB, academics, civil society, and usually about 100 to 400 community members. Not all people in Juchitán opposed the project. Property owners explicitly spoke out in favor of the project because, «[a]s they saw it, this was their land, and they had the right to rent it to whomever they chose» (Friede & Lehmann 2016, 87). Labor unions were also pushing for the consultation to end so that workers could start their jobs. In their detailed observations of the dynamics during one of these sessions, Friede and Lehmann highlight the power politics at play in the speeches of local politicians, union leaders, and indigenous rights activists, each of whom claimed to speak as a representative of larger constituencies.

The consultation process led to severe tensions within the Juchitán community. A coalition of NGOs organized an Observatory Mission of Human Rights to report on the manner in which the consultation was held in comparison to relevant national and international standards. One of the observers in the Mission reported that, from the moment of the first assemblies, death threats were made against some community members by other community members, or via anonymous phone calls. This atmosphere of heightened tensions between those in favor of the project and those against it continued throughout the process. Members of the observer mission were also criticized, as people in favor of the project would yell «human rights, get out of Juchitan» («*fuera derechos humanas de Juchitan*»). As one member reflected, «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.»

At the end of the consultation in August 2015, the government declared that the community had given its consent to the project. A few weeks later, though, more than 1,200 community members filed a lawsuit, arguing that there had been a number of problems with the consultation process. One critique was that in January 2015, while the consultation process was still ongoing, the Regulatory Commission on Energy approved the project. On December 11, 2015, a judge suspended the construction of the wind park because the permits had already been given to the company, even though the consultation process had not been concluded (Manzo 2015). This suspension and others like it increasingly have broader impacts on natural resource projects in Mexico, as international banks and funds have begun taking note. In the case of this project, in April 2016, a Dutch pension fund withdrew its $250 million investment, stating that the project was too controversial and had been delayed too long. The pension fund also cited the opposition of local indigenous tribes as a

18 It was based on Article 71 of the Constitution of Oaxaca, reform 30 July 2015 and Article 2 of the Constitution of Mexico.

reason for its withdrawal (Rojas 2016). As of August 2017, the project continues to be stalled.

These cases of the wind park development in Oaxaca are examples of the dynamics that are at play once extractive projects are planned. Human rights organizations have registered a range of pressures faced by those defending their land rights, including police harassment, threats over the phone, home surveillance, being followed around, vandalism of homes, police searches of offices, and arbitrary detentions (Comité de Defensa Integral de Derechos Humanos Gobixha 2014, 26–28; Peace Brigades International Mexico 2013). Since 2012, the Law for the Protection of Human Rights Defenders and Journalists foresees protection measures such as personal bodyguards for those that face imminent danger (on shortcomings of protection at the national level, see Comisión Mexicana de Defensa y Promoción de los Derechos Humanos 2015, 23). However, Amnesty International (2014, 34) as well as community members and NGOs reported that these legislative advancements are often not applied, or are only partially applied, and are often ineffective when they are.

5 Philippine plantations: Landed farmers or landless workers

Land is a historically contested issue in the Philippines. As a result of colonialism, large tracts of land ended up in the hands of a few *hacienderos*, large-scale landowners, who then employed the mass of the country's landless poor. To this day, the *hacienderos* still determine much of what happens with Philippine soil, whereas the redistribution of land is a traditional demand made by the landless populations in many rural areas. This demand has been recognized in Philippine law for more than three decades, but the country's legislation on land reform is full of loopholes and there has been slow implementation of its progressive elements. Landless peasants therefore struggle to assert their land rights against the powerful interests of local elites and (their) companies, which use large tracts of the land for industrial agriculture. This contestation plays out in an atmosphere marked by a high degree of violence, the involvement of the military, armed conflicts with communist groups and Islamist insurgents, and widespread impunity for perpetrators of gross violations of human rights.

5.1 The Philippine's political economy of land

In the last decade, the Philippine economy has been transitioning toward an industrial and service-based economy, accounting for 30% and 56% of the country's GDP, respectively. Although agriculture used to provide 31% of the national GDP 40 years ago, this percentage has steadily declined, comprising only 9.6% in 2015 (World Bank 2017).[19] Still, agricultural land in the Philippines equals roughly 41% of the country's total land area (World Bank 2017). Agricultural exports in 2015 amounted to 9% of the country's total exports (Philippine Statistical Authority 2017), and the Philippines continue to be the world's largest producer of coconut, pineapple, and Abaca (a plant with strong fiber used for production of ropes) (Trading Economics 2017). Japan, the United States, China, the Netherlands, and a range of Asian countries are among the top recipients of these products (Philippine Statistical Authority 2017).

The Republic Act No. 6657, which envisaged the Comprehensive Agrarian Reform Program (CARP), was passed in the Philippines on June 10, 1988. Although this 1988 law certainly included fairer land distribution compared to the situation

19 Similarly, in 1990, 45% of its workforce worked in agriculture, whereas in 2014, only 30% were employed in the sector, http://data.worldbank.org/indicator/SL.AGR.EMPL.ZS?end=2014&locations =PH&start=1990&view=chart

before, it was, nevertheless, full of loopholes and exemptions. The law favored landlords over farmers' interests through land ownership schemes in the form of stock distribution options, leaseback agreements, a long list of exemptions, and prioritization of the redistribution of public over private land (Tadem 2015, 1–2). After 28 years, completion of CARP is still not in sight, with about 477,000 hectares (ha) of land remaining to be redistributed as of 2015, while another 1 million ha of agricultural lands inexplicably vanished from the public records (Tadem 2016). Most of the remaining land is now in the hands of private landowners, who have mounted continuous resistance against redistribution efforts. Numerous reports suggest that farmers have been evicted, harassed, intimidated, and killed by landlords and private security forces. Pro-land reform factions consistently point to the need for effective implementation of CARP or a new land reform policy, with many advocating in particular for the passage of the Genuine Agrarian Reform Program that advocates for the free distribution of the land.[20]

5.2 Mindanao's agricultural path to development – large-scale plantations

Offering ideal conditions for agricultural production, Mindanao is considered to be the «food basket» of the Philippines (Tria 2016) and is home to a large number of plantations for the Philippines' main agricultural products, such as palm oil, pineapple, and bananas. Multinational companies such as Dole and DelMonte are heavily involved in the agricultural sector in the Philippines. For example, 89% of the pineapple-processing operations in the Philippines belong to these two companies (International Labor Rights Forum 2008, 16). Given the legal restriction on foreign land ownership in the Philippines, local Philippine companies also have a relevant share in the sector. Companies such as the Sumifru (Philippines) Corporation maintain plantations covering 14,000 ha, located mainly in Mindanao (Salamat 2015). Other Philippine companies also operate around Davao, the capital city of Mindanao.

There are an estimated 12–15 million indigenous peoples in the Philippines (12–15% of the population), of which around 65% live in Mindanao and are collectively called «Lumad» (Paulin 2016, 1). In addition to negative impacts related to mining on and around ancestral territories, large agricultural plantations in Mindanao increasingly encroach on indigenous peoples' land (Center for Trade Union and Human Rights 2013). Indigenous peoples in Mindanao are one of the most marginalized segments of Philippine society and have historically been trapped between a heavily militarized government and various armed factions fighting for recognition of their respective demands. One conflict based on a Moro (Muslim minority in Mindanao) quest for self-determination consists of two major factions, both of which, since 2014, have agreed not to engage in armed struggle due to concessions made by the government. In addition, the militant wing of the Philippine communist party,

20 Genuine Agrarian Reform Bill, as introduced in the Seventeenth Congress, First Regular Session, House Bill No. 555.

the New People's Army (NPA), is active in Mindanao. Peace talks between the government and the National Democratic Front of the Philippines acting on behalf of the NPA were recently abandoned. Land reform had been part of these peace talks, to be included in a comprehensive agreement on socio-economic reforms. To make things worse, President Rodrigo Duterte introduced martial law in May 2017 in the whole of Mindanao, due to the government's ongoing fights against Abu Sayyaf and Maute in the southwestern-most parts of the Philippines. Human rights organizations have called for an immediate end to martial law and have pointed out that the military and police are using the circumstances to intimidate, criminalize, and abduct critics who have nothing to do with the insurgency. As before, farmers, Moro, and indigenous peoples are among the worst-hit by the imposition of martial law and the pressures that go along with it.

5.3 Frustrating land reform in practice

Despite progressive elements contained in the initial law on land reform (CARP) and its successors, to date, it seems that *hacienderos* and companies have largely succeeded in restricting farmers' access to land. In principle, the landless qualify as Agrarian Reform Beneficiaries (ARBs), who, as such, are supposed to receive Certificates of Land Ownership Award. On the basis of these certificates, individuals may operate larger tracts of land through cooperatives that collectively manage agricultural production. ARBs may also live on this land and carry out subsistence farming. In practice, the possibilities for ARBs to actually implement the spirit of CARP remain scarce at best. The most prevalent type of land reform in the Philippines maintains ARBs' dependency on external companies and subjects most cooperatives to these companies' authority. The resistance of one such cooperative, the Madaum Agrarian Reform Beneficiaries (MARBAI) cooperative, close to Tagum, a city in Mindanao, is instructive for understanding companies' tactics in thwarting the implementation of land reform in the Philippines.

MARBAI's resistance to being stripped of land reform benefits by big agribusiness

In December 1996, a number of individuals in southern Mindanao received their initial Certificates of Land Ownership Award as ARBs and grouped together in a cooperative. The cooperative entered an Alternative Venture Agreement (AVA) with the company Hijo Plantations Inc. (HPI), which formerly owned the land and voluntarily offered it for distribution. The financial burden for all the inputs was placed on the cooperative, whereas the company retained the full right to specify what inputs were required. Bananas, the crop cultivated on the land, also had to be sold exclusively to HPI, thus preventing the ARBs

from entering into more beneficial sales agreements with other companies. In addition, a management board represented all members of the cooperative in their relation to the company. Access to information by cooperative members other than those on the management board was virtually nonexistent. Cooperative members also reported instances of bribery between company and board members and other types of influence leveraged to make them act in favor of the company.

On the basis of this relationship, conditions for the majority of ARBs did not, in fact, improve in comparison to their prior status as workers for the same company. At no time did the workers effectively assume ownership of the land. In fact, some of them never resided on the land, despite wanting to, and costs for inputs were higher than the benefits received from the sale of the harvest. Over time, the farmers' cooperative thus accumulated a huge amount of debt toward HPI.

Unhappy with this situation, the cooperative attempted to renegotiate the contract in 2008–2009, but it turned out to be difficult, with one faction breaking away to found a new cooperative by the name of MARBAI, after receiving their own certificate from the relevant administrative authorities for an area of 145 ha in 2010. After this, however, the company continued to claim and occupy the land granted to the MARBAI cooperative. When members of the new cooperative harvested the land that had been awarded to them, they faced criminal charges filed by the company for theft of products. The company also initiated legal proceedings before regional courts to fight the MARBAI members' Certificate of Land Ownership. In 2015, MARBAI members obtained a decision upholding their reinstatement on the land, followed by a writ of execution in March 2016. In practice, however, the company did not move from the land.

In December 2016, frustrated by the company's disregard for the legal decisions and still being entirely dispossessed, the MARBAI members physically occupied the 145 ha that had been awarded to them. This situation did not last long, however, as just three days after their initial occupation of the land, they faced violent encounters with private security guards, who shot several MARBAI members. Pesticides were also aerially sprayed over the area where the farmers were settling.

On December 16, 2016, then-Secretary for Agrarian Reform, Rafael Mariano, issued a cease-and-desist order against the company, ordering them to refrain from driving the farmers off their land. Discussions among the stakeholders involved did not lead anywhere though, and on December 31, between 3 a.m. and 5 a.m., more than a hundred security guards started to attack the farmers, forcefully driving them off their land. The MARBAI farmers were forced to lie on the ground and were hit with rifle butts, while some members were tied to trees and others were locked in their boardroom. Several personal items and official documentation of the cooperative went missing during this incident. Meanwhile, the company attempted to quash the cease-and-desist order – to no avail, as it was upheld by the court of appeals.

In response to this frustrating situation, MARBAI members mobilized once again, resulting in the Secretary of Agrarian Reform and, eventually, President Duterte, visiting their campout in May 2017. About a week after Duterte's visit and under heavy police protection, MARBAI members were finally reinstalled on the land that had been awarded to them.

The case of MARBAI is quite unique, in the sense that it led to the actual reinstallment of the farmers on their land. In most other cases in the Philippines, ARB cooperatives remain trapped by non-beneficial agreements with companies that dictate the development on the land, regularly in the form of large-scale agriculture (for more information on AVAs in the banana industry, see OXFAM Philippines 2016). ARBs essentially retain land ownership on paper only, with no influence or decision-making power over the land in practice. Companies use a range of legal tactics and economic pressure to avoid the transfer of land to the farmers. Such tactics include categorizing land as «non-agricultural» to circumvent inclusion in agrarian reform; introducing company-controlled dummies, such as family members, as ARBs; and setting up unfavorable leases or shareholder agreements with ARBs that result in cooperatives being divided. Thus, even though Philippine law recognizes rights that would allow many landless farmers to obtain a small portion of land, implementation seems illusory due to the powerful status of local elites, supported either explicitly or tacitly by local government and police.

The situation for the realization of indigenous peoples' rights to land in the Philippines is equally grim. The Republic Act 8371 of 1997, also known as the Indigenous Peoples Rights Act, was celebrated as a landmark act for its aim to defend the rights of indigenous peoples and secure their say in the development of natural resources. On paper, the law looks progressive and, in section 7b, provides for indigenous peoples' rights of ownership of their ancestral domains. These rights include the right to develop, control, and use lands and territories traditionally occupied; to benefit and share the profits from the utilization of natural resources; and to negotiate the terms and conditions for the exploration of natural resources. Section 17 adds the right to decide their own priorities for development. According to the law, it is the National Commission for Indigenous Peoples that monitors and safeguards the rights of indigenous peoples. Among its competences, the Commission shall only issue – upon the free, prior, and informed consent of the indigenous peoples concerned – a certificate prior to the granting of any license, lease, or permit for the exploitation of natural resources.

After the passage of the Indigenous Peoples Rights Act, any new establishment of agricultural plantations on indigenous land would therefore require the FPIC of the respective community, based on its traditional decision-making structures. In practice, however, companies often do not secure FPIC before projects involving natural resources on indigenous land are carried out. According to one NGO staff member working on indigenous peoples' rights in the Philippines, the process of obtaining

FPIC suffers from a great number of flaws, including undue influence by companies on decision-makers in the communities; paramilitary and military coercion of community members; the lack of adequate information on proposed projects; and collusion between companies and government authorities who are supposed to monitor the adequate implementation of FPIC. The National Commission for Indigenous Peoples, as the government authority tasked with issuing FPIC certification, is not trusted by a large number of indigenous peoples, due to being notoriously slow in dealing with requests, the acceptance of flawed consultations, allegations of corruption, and a lack of investigations in cases where reports about violations of indigenous peoples' rights were presented. In a very worrying trend, a small number of indigenous peoples have begun to actually refuse to apply for land rights at all. They fear that once titles are registered, companies and government officials will subsequently have the chance to use those titles against them in order to carry out projects.

Devoid of allies in the government and left with laws full of loopholes or implemented badly, affected communities start campouts, rallies in the capital city of Mindanao, or legal action to get their rights recognized in practice. Rarely do such actions go unnoticed and without pressure. On the contrary, indigenous and rural communities in Mindanao are among the worst hit by intimidation, threats, criminalization, and even physical attacks, including killings, when they continue to claim their rights to land.

6 South Africa: Metals more precious than men and women

The South African government follows a generally pro-extractive-industry development policy. Existing safeguards intended to ensure that natural resource exploitation projects take local visions for development into account and contribute to improving the living conditions of South Africa's most marginalized populations, in particular black people, are poorly implemented. The necessity of having local stakeholder consultations with affected communities as part of the mining projects is a cornerstone of national legislation, but in practice, decision-making is often entirely delegated to the private sector. The northern province of Limpopo – home to the Bushveld Igneous Complex that contains the world's largest known deposits of platinum group metals – is also home to many conflicts over different approaches to natural resource development. When communities advocate for their visions of natural resource extraction, they may face disproportional police violence during demonstrations, defamation, or libel suits against project critics, and flawed participation procedures that prioritize business interests over meaningful local development.

6.1 General policies: Harmonizing the mining industry and rural (black) development

Mining products make up 44% of South Africa's overall exports. Currently, its primary export commodities are gold, diamonds, platinum, and iron ore. In the period from 2009 to 2014, the country's export rate increased by 8%, but South Africa's natural resource reserves are depleting, as in the rest of the world. As of 2010, South Africa's total remaining mineral reserves were estimated to be valued at $2.5 trillion. If extraction rates remained constant, the country's gold reserves were projected to last another 32 years, platinum group metals another 244 years, and iron ore another 25 years (Statistics South Africa 2013). The main export partners of South Africa in relation to natural resources are China (11.3%), the United States (7.3%), Germany (6%), Namibia (5.2%), and Botswana (5.2%), followed by Japan, the United Kingdom, and India (each with 4–5%).

In South Africa, mineral rights are vested in the state. Section 3 of the Minerals and Petroleum Resources Development Act (MPRDA) posits that mineral and petroleum resources are the common heritage of all the people of South Africa and the state is the custodian thereof for the benefit of all South Africans. Section 2 of the same Act states that the objective of the Act is to substantially and meaningfully expand opportunities for historically disadvantaged persons, including women, to

enter the mineral and petroleum industries and to ensure that holders of mining and production rights contribute toward the socio-economic development of the areas in which they operate.

South Africa's Gini coefficient, which measures inequality, was 0.63 in 2013, one of the highest in the world (United Nations Development Programme 2017). Inequality is particularly notable between black and white South Africans. Black South Africans make up 80% of the country's population, but earn one-fifth of what white South Africans make (Onishi 2017). In order to rectify these persisting historical injustices against the black majority population, the Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry (hereafter Mining Charter) was put into place already in 2002. In principle, the Mining Charter is legally binding and aims to substantially and meaningfully expand opportunities for black people to enter the mining and minerals industry, and to benefit from the exploitation of the state's mineral resources. However, the latest amendment to the Mining Charter, adopted in June 2017, has been suspended under judicial review due to an urgent court interdict applied for by the Chamber of Mines (Fin24 2017).

Measures of black economic empowerment foreseen in the Mining Charter of June 2017

- Holders of new mining rights must have a minimum of 30% black person shareholding, of which a minimum of 8% of the total issued shares shall be issued to mine communities (in the form of a community trust).
- Mine communities form an integral part of mining development, which requires a balance between mining and the mine community's socio-economic development. A holder must meaningfully contribute towards the development of the mine community. [...] Mine community development projects referred to above must include infrastructure, income generating projects and enterprise development.

Mineral resources are non-renewable in nature. Accordingly, exploitation of such resources must emphasize the importance of balancing concomitant economic benefits with social and environmental needs without compromising future generations.

These black economic empowerment requirements – less-demanding versions of which were also contained in previous versions of the Mining Charter – present cumbersome conditions for mining operations in the eyes of the extractive industry and some South African politicians, who want to see smooth extraction operations boost domestic consumption and increase exports. International investors have therefore tried to challenge these regulations using international investment

arbitration (*Piero Foresti et al v. the Republic of South Africa* 2010). In an attempt to alleviate some of the fears that caused foreign investors to pursue international arbitration, the government of South Africa passed the Protection of Investment Act in 2015, which strengthened legal safeguards for foreign investors. There are now very few restrictions on how much foreign entities can invest, tax rules are simpler, and a Strategic Industrial Project Program was introduced to provide tax incentives for investors. In addition, a foreign investment cash grant is now available that can provide up to 15% of the value of new machinery and equipment, whereas a skills support program can provide up to 50% of training costs and 30% of workers' salaries (Santander 2017).

Development strategies of the South African government are determined by Integrated Development Plans set up at the municipal level. By law, Integrated Development Plans require the participation of the local population and reflect the desire of the early democratic government of South Africa to include its population in decision-making after the long legacy of exclusion under apartheid (Duncan 2016, 43). These plans are set up for a period of five years and participation is based on broad stakeholder meetings to discuss priorities. These consultations are publicized in local newspapers and by ward councilors who spread the word. However, experience indicates that local stakeholders sometimes feel that they are being «participated» (Duncan 2016, 44) instead of having a meaningful voice with which they can influence the content of these integrated development plans. Integrated Development Plans are also a benchmark in the new Mining Charter of 2017. Holders of mining licenses must contribute to the respective mine community's development through its Social and Labor Plans by identifying priority projects, as per the approved Integrated Development Plan. Yet, where and when mining projects come into being is not systematically planned by the government of South Africa. Instead, it is companies that apply to explore, and subsequently exploit, locations that promise to generate a rich harvest of raw materials.

Mining projects in South Africa also have to respect other domestic laws relating to the protection of the environment, structures of traditional authorities, and customary decision-making or management of water resources. These other laws, when implemented strictly, are well-suited to alleviate some of the fears communities may have regarding negative impacts related to mining. In theory, mining projects in South Africa thus take place in a triangle of economic, social, and environmental considerations enshrined in a number of laws and sanctioned by the country's highest court (*Fuel Retailers Association of Southern Africa v. Director-General Environmental Management* 2007). In practice, however, decision-making in relation to extractive projects does not follow this approach in the majority of cases.

On the municipal and provincial levels, government ministers and members of the Executive Council (government of the provinces) often speak favorably about mining and its potential to help communities thrive and develop, as several community members interviewed for this study highlighted. Provincial and municipal authorities are also widely reported to be financially involved with mining companies. The involvement of domestic black shareholders, as a result of the black

economic empowerment policy, is said to benefit only a small middle-class black elite consisting of politicians at all levels. As a further consequence, corruption is widespread in the extractive sector (Kasner 2015) and government officials often have a clear conflict of interest (Harvey 2017, 3). For example, in the case of the Bathlabine community, the former head of the government of Limpopo was engaged in a mining project carried out by Blue Platinum Ventures. The project was implemented without adequate safeguards for the environment or proper consultation of the affected communities. Due to resistance by local community members, the director of the mine was convicted of operating a mine without the required environmental permit and the mine was eventually shut down.

In sum, the South African government welcomes mining projects, bolstered by certain pieces of legislation and often personally supported by officeholders at various governmental levels. Despite existing legal guarantees that require the integration of environmental and social concerns in developing South Africa's natural resources, in practice, mining operations often proceed without due respect for these requirements, to the detriment of local populations.

6.2 Conflicts about platinum extraction in Limpopo

Limpopo is the northernmost province of South Africa and home to a relevant portion of the Bushveld Igneous Complex, which contains the world's largest known deposits of platinum group metals, whose estimated reserves equal 55.7% of the world total (Benchmarks Foundation 2008). The three biggest producers of platinum group metals are two British companies – Anglo American Platinum and Lonmin – plus the South African-based company Implats. Anglo American Platinum alone accounted for more than one-quarter of all refined platinum production in 2014 (Bell 2016). Thus, a significant amount of the profits from South African mining go into foreign pockets. Anglo American Platinum had annual revenue of $33 billion in 2013, the majority of which came from its mining activities in South Africa. In terms of its use, platinum is an essential component in petrol catalyzers, used to reduce carbon emissions in motor vehicles. Such catalyzers are required by domestic law in the EU, the United States, Japan, and China, which are the four main recipients of platinum worldwide.

In the case of platinum, the main deposits in Limpopo, as in South Africa generally, are largely concentrated in former homelands, which are those territories that were set aside for the black population under the apartheid regime. Despite South Africa's Constitution insisting that security of tenure be accomplished in these former homelands, no legislation yet exists to give expression to this, with the result that many South Africans live on land that is still held in tribal trusts and allocated at the discretion of ruling chiefs (Harvey 2017, 6–8). Mining, as a potentially benefit-rich path of development for communal lands, often leads to internal community disputes and challenges in authentically representing communities' interests. In addition, conflicts with local communities about working conditions, their involvement in the design and implementation of the mines, and protection of the environment

are frequent. One example from Limpopo is the Marula mine, operated by Implats, one of the three biggest extraction companies. Community unrest persists in relation to the Marula mine due to irregularities in the distribution of benefits and an accident that resulted in a worker's death (Creamer 2017). Another case in point is the Ivanplats mine, near Mokopane, also in the province of Limpopo and operated by Canadian company Ivanhoe Mines Ltd. According to one community member, contestation started upon the company's arrival and has continued throughout the mining project's implementation.

Such problems with the mining industry are indeed reflective of a more generalized pattern throughout South Africa. Major concerns with mining activities relate to the environmental pollution of waterways, the emission of dust into surrounding areas, and the scarcity of water due to overuse in industrial activities. The infamous Marikana incident – in which 35 striking mine workers were killed by the police during an attempt to disband their demonstration – is only one example of the negative treatment endured by mine workers. Other adverse conditions include harmful health effects, unpaid pensions, and harassment and sexual abuse of women in a male-dominated environment. Local communities often see their traditional lands expropriated and, left without grazing land, do not usually receive what they are promised in community development plans. Many affected communities and NGOs have warned against and deplored the negative impacts of mining. Their voices, however, have not been taken seriously. Instead, many have been excluded from existing participation mechanisms through various restrictions leveled against them.

6.3 Privatized consultations do not guarantee respect for local aspirations for development

One way to achieve local participation in natural resource development is through consultation. As in other countries, the South African legal system provides for consultations with various stakeholders. The MPRDA explicitly provides for consultation with communities that are potentially impacted by the proposed mines. Once a consultation is required under this legislation, private companies carry out the consultation process almost entirely on their own, without any government involvement or oversight (Sections 10, 16, and 22 of the MPRDA).

The Department of Mineral Resources has concretized the duty to consult in its Guidelines for Consultation with Communities and Interested and Affected Parties. According to the guidelines, communities should be involved at the earliest stages of any mining project, when companies apply for prospecting and mining rights and permits. Based on the definition of consultation contained in the guidelines, however, consent from affected communities is not required. Nevertheless, consultation requires engaging in good faith to attempt to reach a compromise and to accommodate the interested and affected parties. Consultation further requires the applicant to impart information to the affected communities, including any potential socio-economic, cultural, or other impacts of the mining project, and it requires that

the content of this information – and the views expressed by the communities on the issues discussed – be documented.

As they are currently carried out, community consultations for mining projects often do not include all the relevant community stakeholders. There is a marked tendency to consult only with the chiefs of affected communities or their relatives. Chiefs, however, tend not to represent the interests of their communities at large when mining projects come in and personal financial benefits are to be had. Sometimes, when companies are unsuccessful in convincing the chiefs to approve their plans, they carry out consultations with randomly selected community members. In the case of the residents of one village in Limpopo, the community jointly decided to boycott the upcoming consultations with the company in order to subvert the process and refused to grant legitimacy to the planned mining activities. However, the company managed to identify isolated individuals who finally signed the consultation protocol that was submitted to the government authorities. One community member noted, «Yes, this person is to blame. Still, he was probably hungry and the company offered him something. No wonder that he signed.»

The information imparted by companies to the communities during consultations is often quite positive and depicts a future that includes revenue for all, local development, jobs, better housing, and other such promises. For communities without experience or knowledge of the potential negative impacts of mining, these descriptions are indeed enticing, in particular in places where unemployment has risen to 25% or 35% of the population. Mining projects are often tempting to community members at large and, in particular, to those with decision-making powers who may get an even larger share of the benefits. Traditional leaders are often bribed or selectively rewarded with services to be delivered and generously paid for by the company. Thus, traditional authorities often fail to perform the role that they could and should perform. As a result, communities quickly start to be divided about their collective approach to mining proposals. Companies exploit these potential divisions by making deals that benefit only some of the affected community members.

Against this background, it is not surprising that community members tend to resist mining projects sooner or later. If they are well-informed from the start, they may take immediate efforts to block a mining project. If they have never had to deal with mining before, previous cases show that pollution is often a main driver for communities to become active. Cracking houses due to rock-blasting in the vicinity of residential areas is another common source of unrest. Lost jobs and the failure to deliver on promises of employment also tend to produce feelings of betrayal. Often, communities begin to organize against their own chiefs, the local government, and the companies in order to attain the promised local development and to prevent unreasonable negative impacts. They march and protest, they write letters, and they use legal means to compel the relevant actors to live up to their responsibilities. Once they start to do this, however, they may face even more problems than those they are already contesting.

PART 3

PRESSURES ON CIVIL SOCIETY AND EXISTING RESPONSE STRATEGIES

7 Patterns of restrictions: Pressures on civil society are shaped by the different stages in natural resource development projects

The examples of natural resource development in India, Mexico, the Philippines, and South Africa show how laws and administrative decisions can allow, and sometimes even foster, natural resource exploitation for profit at the expense of local communities' rights. Legal guarantees for civil society participation in decision-making, albeit enshrined in national legislation, do not automatically protect individuals and communities affected by natural resource development projects. On the contrary, affected communities and NGOs often have to actively advocate for being included in decision-making by government authorities and the private sector. When communities, their organizations, and NGOs push to be heard and have their criticisms taken into account, they often face defamation in the media, threats per SMS, arrest warrants, or even killings. Such pressures and restrictions on civil society tend to follow a pattern during the natural resource development cycle and are often traceable to specific stages in individual resource development projects.

Van der Borgh and Terwindt have developed a useful model to identify different types of pressure that civil society actors can face, using five different categories (see Figure 2):

a) physical harassment and intimidation;
b) criminalization through prosecution and investigation;
c) administrative restrictions;
d) stigmatization and negative labeling; and
e) participation under pressure

(Van der Borgh & Terwindt 2012, 1070).

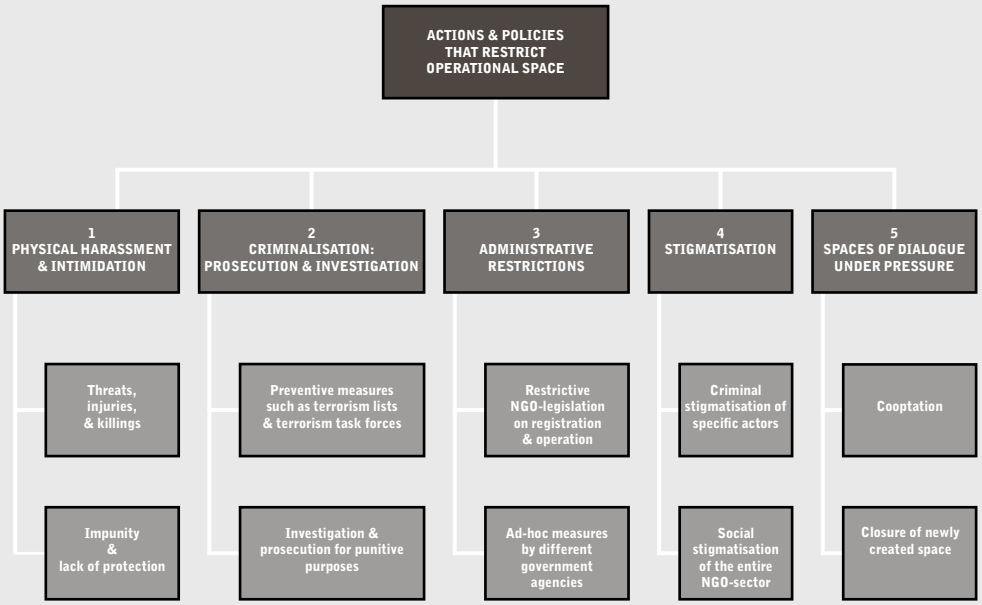
This scheme is also useful for identifying the pressures faced by civil society actors in the natural resource arena and, in particular, for analyzing relevant patterns.

The timeline of natural resource development introduced in Chapter 2 provides the background for the analysis of patterns in the sequence and variations in restrictions imposed on the space of NGOs and community-based organizations. Typically, little information is made available to communities in the early stages of natural resource development planning, hampering any efforts to make informed decisions or mobilize. Often, as soon as civil society actors start to speak up about the potential negative impacts of a natural resource development project, or express any criticism or opposition toward it, they face immediate pressure. This pressure can take the form of targeted intimidation, stigmatization, or criminal charges against individuals or organizations. In the extractive industry sector, the stage in which extraction licenses are approved is often particularly contentious. Similarly, the case in Mexico has shown that mandatory consultations about upcoming wind parks regularly involve intensified contestation that includes pressures on civil society actors through acts of intimidation, threats, and personal attacks. At such times, public protests can be a cause for mass arrests, administrative restrictions on freedom of assembly, and potentially violent physical encounters with authorities or private security companies hired to guard project premises. Finally, civil society leaders who persist in resisting the implementation of natural resource development projects, despite such threats and defamation, run the risk of being killed for their activity.

7.1 Lack of knowledge on the arrival and nature of a project

Access to information about natural resource policies and plans for actual projects is a precondition for civil society engagement in decision-making. The withholding of information by municipal or state authorities and companies effectively prevents civil society from using any spaces they may have access to in order to participate in, or contest, natural resource development decisions. Natural resource development projects often start with the sudden appearance of foreign actors in a remote location or rural area, in a way that often seems arbitrary to local residents. According to one community activist in Limpopo in South Africa, «For me, it all started in 2009, when they were already digging behind my house in the mountains.» In other cases, information about a project may come earlier, but usually only after significant steps have been taken toward the realization of the project. Speaking about the POSCO project in Odisha in India, a community member said that «we only heard about the project through the local news and, just one day later, the memorandum of agreement between the government and the company was concluded.» In South Africa, women in rural areas suffer even more from a lack of access to information. They are largely ignored in traditional decision-making structures, and even when the whole community is informed about an impending resource development project, women are often the last to learn about it. As a representative of an NGO working on women's rights in South Africa summarizes, «Women just wake up and hear that all the land is going to be mined.»

Figure 2: Actions and policies that restrict civil society's operational space



Source: Van der Borgh & Terwindt (2012, 1070), own chart.

Both the government and the private sector have a role to play in the provision of information to civil society actors regarding potential resource development projects in their communities, but they often fail to provide adequate information in a timely manner, whether through negligence or intentionally. Frequently, companies do not pay attention to whom they provide relevant information and fail to formulate the information in a manner understandable to community members. They also tend to downplay the possible negative impacts of resource development projects. This practice is not limited to the countries under review here. As Schilling-Vacaflor points out, the financing of environmental impact assessments by corporations is «a common practice in Latin America and elsewhere» that has resulted «in documents that are shaped by ‹corporate science› (Kirsch 2014) and minimize expected negative impacts» (Schilling-Vacaflor 2017). Government bodies also frequently fail to provide proper information to civil society. For example, an NGO representative in Oaxaca, Mexico, recalled a case in which a company initially told community members that it was going to build a hospital and school in their area. Once the community realized it was going to be a mining project, they asked the relevant governmental authority whether any license had been approved. Even though a mining license had

long since been granted to the company, the government official denied knowing anything and refused to share related documentation with the community, such as the environmental impact assessment that had been conducted ahead of the project. In South Africa, communities frequently have not heard of – let alone had access to – the «Social and Labour Plans» that are legally mandated as part of licensing procedures for resource development projects.

Without access to such documents, communities and NGOs are hampered in their ability to operate, organize, and engage meaningfully in any decision-making procedures related to natural resource development. A human rights lawyer in Oaxaca explained that access to such technical information is necessary to engage in litigation against specific projects. Yet, even after requests under Mexico's Law on Transparency, he has been denied such information. Moreover, the search for information and the demand for transparency can get communities and NGOs into trouble. For example, when agrarian reform beneficiaries of the MARBAI cooperative in the Philippines commissioned an external auditor to find out how the company HPI had stripped them of their position as landowners, they faced repercussions. According to one member of the cooperative, the company spread false information that disputed the findings of the auditor and offered money to individuals within the cooperative to turn them against the rest of the collective.

When NGOs challenge projects and support community-based organizations

NGOs and affected community members may oppose natural resource development in their community for a number of reasons, including negative environmental impacts, forced relocation of local residents, the lack of improvement in living conditions, and the destruction of culturally important sites and traditional ways of living for (indigenous) communities. For example, wind parks in Mexico have generated criticism from local civil society actors due to their expected environmental impacts, lack of community access to the energy produced by the parks, and the lack of sustainable jobs offered by such projects. When communities voice such concerns against specific resource development projects, they are frequently supported by what can be called «broker organizations.» Such organizations provide legal support to challenge the lack of information, consultation procedures, environmental assessments, or appropriate licenses for a project. Broker organizations can also support communities in bringing concerns about specific projects to the national or even international level. In addition, broker organizations typically analyze governmental policies that drive resource development and exploitation in order to provide official comments on draft legislation, submit reports to human rights monitoring bodies, and conduct scientific studies.

On more than one occasion, NGOs that fulfill such functions have gotten into trouble with governmental authorities, usually around their legal registration status and funding. In India, for instance, the Foreign Contributions Regulation Act (FCRA) of 2010 led to the cancellation of the registration of many NGOs, ostensibly on formal grounds, such as the failure to apply for renewal or the spontaneous reassessment of licenses (Amnesty International & Human Rights Watch 2016). In practice,

the FCRA affected a number of NGOs critical of government policies, including in the natural resource arena. In one such case, the Indian government froze the bank accounts of the Indian Social Action Forum – an organization working on indigenous peoples' land rights – as its work was deemed likely to negatively affect the public interest (VANI 2014). The effect of such restrictions goes beyond the NGOs directly impacted by them. For example, other organizations in India saw their funding diminish in anticipation of possible problems with the FCRA. Because foreign funding leads to so much legal scrutiny, sometimes donors and NGOs prefer not to deal with the hassle. Burdensome registration requirements for NGOs have a clear impact on civil society space, whether they intentionally target critics or not. NGO staff members in Mexico, for example, feel that the country's fiscal laws are problematic, as «[T]here is a feeling of being the object of constant investigation in relation to financing and partners. The requirements are excessive and show a general distrust of civil society.» In such environments, NGOs can easily be targeted by governments through reducing their financial means. An NGO representative in Mexico reported that, in a conflict about a hydro-electric dam, the municipality threatened to cut their resources.

Governments are not the only actors that put pressure on such broker organizations. In a number of instances, companies have taken legal action against broker organizations, usually after they had spoken out about the negative impacts of a specific resource development project. For example, in May 2017, a subsidiary of the Australian mining company Mineral Resources Limited, known for its controversial attempts to mine mineral sands at Xolobeni in South Africa, sued two attorneys from the Centre for Environmental Rights and a local community activist, claiming 1,250,000 South African rand (approximately €78,000) in damages for alleged defamation in a presentation the individuals gave during a lecture at the University of Cape Town (Mining Review 2017). One member of a South African network of mining-affected communities explains that the company used these proceedings to discourage the lawyers and activist from engaging further. Such lawsuits are known as strategic litigation against public participation (SLAPP) suits (Pring & Canan 1996) and are increasingly used to threaten environmental activism driven by public interest considerations in South Africa and beyond (Hilson 2016), often aiming to silence or frighten the opponent, tie them up with paperwork, or bankrupt them with legal costs (Murombo & Valentine 2011). The current UN Special Rapporteur on Freedom of Peaceful Assembly and Association, Ms. Ciampi, reacted to this alarming trend by circulating a concept note clarifying that companies should refrain from such practices «as a means of shutting down public participation and critical advocacy» (Ciampi 2017).

Stigmatizing project critics to discredit their concerns and demands

Once the plans for a natural resource development project have been set and civil society has managed to find out who and what is involved, they may speak out and seek to have their interests taken into account in decision-making related to the project. Taking a critical position on natural resource development projects such as

wind parks, agricultural plantations, or mining projects frequently leads to the stigmatization of individual spokespersons or their organizations. Stigmatization – the process through which an individual or organization is rejected as a result of the public attribution of a deeply discrediting characteristic (Van der Borgh & Terwindt 2014, 46) – is often the first attempt made by pro-project actors to discredit critical concerns and demands from civil society. The impact of such stigmatization should not be underestimated as an effective tool for weakening project opposition. As one human rights lawyer in Mexico put it, «[T]he final objective is clear: to create an atmosphere where it is permissible for other actors to attack civil society or to justify those attacks that have happened in the past.» Many civil society organizations around the world have identified defamation as a major problem, reflecting a global trend in contestation over natural resource development policies and projects (Kiai 2015a, para. 42).

The kind of stigmatization employed against civil society actors in the natural resource arena is often highly dependent on local circumstances. In the context of Naxalite (armed) activities in India, proponents of natural resource development projects can easily turn local claims related to land rights into unfounded allegations of communist links, which is often enough to create trouble for local communities. Similarly, peasant organizations in the Philippines are easily discredited by being «red-tagged» as members or supporters of the communist NPA (Observatory for the Protection of Human Rights Defenders 2015, 21). In Mexico, project opponents are often stigmatized as «narcos.» Across country contexts, international organizations are frequently discredited as «foreign agents» and accused of «outside interference.» Even domestic NGOs can face the criticism that they interfere and «manipulate communities» to advance their own interests. In Mexico, a lawyer in Oaxaca explained that government officials had criticized their organization for «destabilizing the region,» suggesting that «we were cheating the people and we were basically blocking progress for the region.» Indeed, project critics are frequently labeled as anti-progress or anti-development as a way to discredit their criticisms related to possible negative impacts of resource development projects. Stigmatization can occur in the form of rumors that are spread by word of mouth or in the media. For example, an NGO representative in Mexico recounted how media articles would frequently describe implementing companies as bringing employment and «peace to the community,» whereas the opposition to a resource development project would be painted as driven by outside interests and lacking real community support.

Such stigmas can make it difficult for broker organizations to obtain or maintain trust among local communities. The representative of an organization in Oaxaca once had to face a community that said «ah, you only come here to acquire funding.» Stigmas can also endanger prospects for foreign funding, as happened with an indigenous rights organization in the Philippines. Such impacts can seriously hamper the work of NGOs. Alleged links to guerilla groups can lead to military harassment, criminal prosecution, and even killings. In India, any connection to communist or Maoist forces may be sufficient grounds for arrest. As one NGO representative in India recounted, «[S]ome women ended up in jail suspected of being aligned with Maoists

for the simple reason that they had taken food from them.» While local community members are the most frequently affected by such allegations, local coordinators of national support networks have also faced criminal charges in the Philippines. Rumors of affiliation to armed groups can also lead to a lack of solidarity. A representative of a human rights organization in Oaxaca explained that, in one case, the disappearance of a project critic was taken as an indication that the person was involved in narco-trafficking. Stigmas can thus, in and of themselves, seriously restrict the operational space for civil society or be a precursor of further repression.

The space of civil society is also the product of a «discursive conflict» in which different interpretations and claims about the (true) agendas of one's «own» group and the «other» group are heavily debated. The power to influence these framings is partly dependent on media coverage, which makes the structure, ownership, and loyalties of media enterprises an important factor in such strategies for restricting civil society space (Van der Borgh & Terwindt 2011, 10). Communities and NGOs are aware of the media's role and power, and often aim to express their messages through various channels, though often to no avail. Naturally, media cannot report everything, but civil society actors in the natural resource arena frequently report a disproportionate lack of interest in their perspectives. One NGO representative in South Africa recalled: «[T]he media doesn't seem to be present when there are peaceful protests. […] They usually only come when there is big news. […] In smaller cases, however, media only comes when things turn edgy and violence is involved or there is another more attention-raising issue.» Some civil society actors have observed that counter-reporting by companies and their allies would rise immediately after they managed to get some publicity. For example, a movement leader in Mexico said: «[E]verything is done with money. If there is one news piece in favor of us, then there are three pieces that are against us, paid for by the government and the company.» This trend points to the ambivalent role the media plays in these instances and highlights that «negative images of activists and human rights defenders are exacerbated when the media picks up on these portrayals and publishes them» (Kiai 2015a, para. 43).

The arrival of a natural resource development project in the form of a plantation, wind park, mine, or hydro-electric dam thus creates the first tensions with local communities by leaving them in the dark about the planning and potential impacts of such projects. During this first stage, communities and supporting NGOs often focus on obtaining such information. This quest can, in turn, lead to the first wave of pressure on civil society, often in the form of stigmatization by both government and corporate actors, including increased scrutiny of civil society by government officials. Tensions can rise even more once natural resource development projects move from the planning phase to implementation.

7.2 Approval of licenses and project implementation despite criticism

A necessary step toward the implementation of a natural resource development project is the approval of relevant licenses, often including impact assessments

and some form of public consultation. Civil society challenges to such licenses can severely threaten the timeline set for such projects and can even threaten their viability entirely. It may be unsurprising, then, that this phase in a resource development project often provokes significant tensions between different actors. In Mexico, for instance, the conducting of a social impact assessment is an integral part of getting a license approved in the energy sector and is often highly contentious. Such impact assessments are supposed to serve communities by sketching the potential effects a project may have on the community, beyond environmental impacts. In practice, however, some NGOs in Mexico suspect that these assessments are used by companies to gather intelligence on communities by mapping all of the organizations that might want to resist the project.

In the natural resource arena, consultations with affected communities are generally a legally mandated requirement for getting a license for exploration or exploitation. However, these consultations suffer from a range of problems, including access to information, the format of consultations, the partiality of government actors, and other concerns (see Chapter 9). Community consultations mark a particular point in time in the natural resource project cycle when project proponents, both governmental and corporate, have to make a decision about if, and how, to involve those living close to the proposed project site.

Threats

Worryingly, when community consultations take place, both community members and the organizations supporting them often face threats. For example, both farmers in the Philippines who advocate for the recognition of their land rights and community members living near wind parks in Mexico have reported receiving intimidating text messages and phone calls, and have heard gun shots near their homes. Notably, during a consultation proceeding in a resource development project in Mexico, the local government could not guarantee the physical safety of a UN representative visiting one of the assemblies due to the extent of tensions within the community. As a result, the UN representatives left the consultation. This was not an insular case, as community members had reported that, from the very beginning of the consultation, they had been receiving threatening phone calls and hooded people always lingered in the area. Once a relevant license is approved for a project, legal action to challenge its validity may provoke further reactions and restrictions against civil society. An environmental lawyer in Mexico remembers: «[O]nce we filed legal action against the license, threats and attacks were on the rise immediately.»

In the context of such tensions around licensing in resource development projects, women are often attacked not only for what they do, but also for what they are (Women Human Rights Defenders International Coalition 2012). They also disproportionally face threats that relate to their families and children (Forst 2017, para. 19). For example, a community leader in Mexico recounted that an unknown truck had parked in the vicinity of her female colleague's home. The men who showed up in front of her house were playing with toys to indicate a threat to her children, specifically that they might be abducted. Vulnerability of civil society actors in the

natural resource arena, however, frequently extends beyond gender dynamics. Often, as an NGO representative in Oaxaca pointed out, vulnerability is intersectional and about being a woman, indigenous, marginalized, *and* a human rights defender.

Thus, community members and NGO representatives are often put under serious pressure when projects advance, approvals are in the process of being obtained, and project implementation gets closer. These increased pressures may also have a strong impact on internal community relations, fostered by the potential material gains that a project might promise to bring for the community, or at least to some of its members.

Community divisions

Natural resource development projects not only attract opposition in local communities; on the contrary, most projects are supported by key figures in the community and by community members who hope that the investment that such projects bring will lead to jobs and improved infrastructure, such as a hospital or a school. Company offers that try to tackle longstanding problems of the affected communities by improving local infrastructure are not bad *per se*. Indeed, communities often make use of consultation procedures to «air grievances about the lack of access to public services in general» (Barrera-Hernández, 2016, 17). In South Africa, this is what Social and Labor Plans – a mandatory step to obtain mining licenses – are all about.

However, differences in positions among community members are often fomented by corporate offers that, either from the outset or due to ill-designed distribution schemes, only benefit a community's main decision-makers or those that lease their land for an impending natural resource project. This was the case, for example, in a community in the Limpopo region of South Africa, where community members never received any of the benefits included in the respective project's Social and Labor Plan. The steering committee tasked with carrying out the project's implementation counted on the participation of the community chief, who did not represent the community, but only his own interests. In Odisha, in India, one community activist reported that the contractors needed to carry out a particular project should have been, in principle, selected on the basis of tenders and approved by the relevant community's Gram Sabha (traditional council). However, the contractors, who were slated to receive a part of the profit when the project went through, had been selected in advance, thereby excluding other community members from the process.

According to Schilling-Vacaflor and Eichler (2017, 2), divisions within and between communities, the weakening of their organizations, and increased distrust on the part of the constituency vis-à-vis their authorities, are among the worst social impacts that communities face due to natural resource development projects. Often, such divisions even split families and neighbors. A community organizer in Mexico told of one community that – in the context of tensions over a natural resource development project – could no longer organize community-wide religious celebrations without leading to confrontations. One celebration would be organized by the mining company, whereas another would be organized by those in the community

who opposed the mining project. On such occasions, families would have divided meals in order to avoid tensions.

Two essential conditions allow the divide-and-rule tactic frequently employed by state and corporate actors to succeed: A unitary actor bargains with a set of multiple actors and then follows an intentional strategy of exploiting problems of coordination or collective action among the multiple actors (Schilling-Vacaflor & Eichler 2017, 2). In South Africa, one member of a community affected by a natural resource development project confirmed how this strategy effectively disintegrated the community in question. He described the general scheme of the company as «basically, for every decision they need, they seek someone and make that person sign on behalf of a larger group without having checked that the person is representative of the will of the community.» In turn, he noted, this «creates problems within the community as you have some people who follow and others who won't. That creates division. They divide and rule.» Companies usually prefer to engage with the leaders of communities in order to have a stable counterpart for interactions with the affected community. However, doing so effectively ignores the complexity of internal community relationships. This can lead to an overrepresentation of local elites, who may «garner the lion's share of the project's benefits» (Keenan 2013, 17). This process is described in the literature as «elite capture» and often excludes the opinions of women, minorities, and people with low socio-economic status, more generally (Keenan 2013, 17).

7.3 Public protests and direct action due to lack of influence in official spaces

In the timeline of the implementation of a specific natural resource development project, the moment may come in which a significant portion of a community has failed to receive adequate information, been excluded from meaningful consultation, and been blocked from the project's incoming benefits. In addition, legal challenges over licensing or land ownership may have been unsuccessful or may just be taking too long. Construction may even have started already, leaving the community to face concrete impacts, such as the loss of access to grazing land or plots for agriculture, as happened to one village in Limpopo in South Africa. At such a moment, communities may decide to organize marches, demonstrations, or picketings, or engage in direct action such as occupying land or blocking access to it.

Such kinds of public action often attract burdensome administrative hurdles. For example, in South Africa, notification requirements have been transformed into the need for permission (Duncan 2016). One particularly striking example occurred in Limpopo, in which the Kgobudi community was required to obtain approval for protest activities from the mining company itself. On another occasion related to the Kgobudi community, the company Platreef, a subsidiary of Ivanhoe Mines Ltd. in Canada, filed a claim to obtain a preventive order against the whole community to stop them from coming close to the mine's premises to protest (Lawyers for Human Rights 2012). In other cases in South Africa, companies have organized

counter-protests «where aligned people take part, the company pays the buses and they go straight to the ministry and tell them the community organizations are not representative of the community.»

Due to the arbitrary administrative system regulating demonstrations in South Africa, communities often have no choice other than to march without a permit. As one community leader said, «We always notified the municipality, but they did not permit the demonstration. For lack of resources, we never tried to challenge this legally.» Such protests – illegal in the eyes of local police – are generally dispersed by force, accompanied by arrests and attacks on protesters using rubber bullets or, exceptionally, even live ammunition. Private security companies have also been said to be involved in attacks on protesting community members in the Limpopo province in South Africa. Frustrated with the burdensome requirements imposed by administrative authorities and unjust treatment by the police, some community protests escalate to violence, resulting in the destruction of property, the burning of tires, and attacks on police. As a community member of the Mosotsi village in Limpopo recalled, «One day a flying rock from [mining] blasting killed a community member. Protests ensued and people got really angry, as they had been demonstrating against this practice for a while. Property was destroyed and burned, and pro-mining members of the community were personally threatened.» Thus, according to one NGO representative working on freedom of expression in South Africa, a spiral of violence can ensue when the right to protest is limited. When this occurs, violent action on the part of community members is often easily abused by project proponents, who use such incidents to paint participants, or sometimes even whole communities, as generally violent and unreasonable. In light of such framing, violent outbursts may not be seen as signs of desperation from community members excluded from decision-making in natural resource projects, but as proof of individuals' or groups' bad faith.

In Mexico, many communities may also resort to physical protests when legal strategies have been exhausted. Affected communities have sometimes decided to blockade roads or occupy government buildings in order to stop the progress of a natural resource project, in particular to block construction. One community in Mexico set up such a blockade for three or four months. As an NGO representative described it, «All licenses had already been given. Therefore, the community started to pressure the company to withdraw.» In this particular case, however, the blockade was unsuccessful, as the police mobilized 1,200 officers to evict the community. In other cases, direct action has been more successful in gaining the upper hand. For example, the mayor of San Dionisio del Mar in the Mexican state of Oaxaca was alleged to have taken 20 million pesos for himself in return for approving a wind park, even though the money was meant as compensation for the community (Lehmann 2015, 22). However, in 2012, town inhabitants occupied and took over the municipality building to reinforce the mandate that had been passed by their general assembly rejecting the wind project (Gerber 2013).

As these examples show, public demonstrations and direct action in response to natural resource development projects are often met with administrative restrictions

on the right to protest and police brutality. For those leading the protests, they can also lead to criminal charges.

Criminalization of (public) protest

As a consequence of demonstrations against the wind project in San Dionisio del Mar in Mexico in 2011, protest leader Bettina Cruz Velázquez was accused of illegally detaining staff of the Federal Electricity Commission and damaging public property. This is certainly not the only example of protests leading to the investigation or detention of visible project critics. In India, a community organizer of the movement against POSCO in Odisha revealed that, «[I]n 2014, after the march against the POSCO office took place, about 500 criminal cases were filed by the company. More people were charged than had been there. Thus, in some cases the charges are fabricated, in others not.»

The use of criminal charges against opponents of natural resource development projects has been highlighted as a recurring pattern in a number of academic and NGO publications (Rojas-Paéz & Terwindt 2014; Global Witness 2017, 34; Clerk & Dugard 2013; Jacob 2016; Observatory for the Protection of Human Rights Defenders 2015). Criminalization can be defined as the application of legal vocabulary and institutional criminal justice procedures to concrete actions and individuals (Terwindt 2014, 165). This everyday practice in the offices of police, prosecutors, and judges becomes problematic when it is used instrumentally and disproportionally to silence government critics. Interviews carried out with NGOs and community members confirm the global pattern of criminal investigations against project critics in the natural resource arena, often involving false, exaggerated, or trumped up charges. Criminal charges usually target the most visible community leaders throughout the countries under study. In South Africa, for example, a demonstration was organized against the operation of the Twickenham mine, run by British company Anglo American Platinum. A community organizer remembers: «During nighttime, after the demonstration, the police came and arrested the nine leaders of the villages. They kept them for three days and, afterwards, the court dismissed the case. The charges related to malicious damage of property, intimidation and arson. None of this actually happened. It was a way to make them stop protesting.»

Indeed, charges related to protesting natural resource development projects are often dropped or remain pending without actual evidence or trial. When cases do go to trial, they usually result in acquittal. For example, the proceedings against Bettina Cruz Velázquez in San Dionisio del Mar lasted until February 2015, when the District Court in Oaxaca acquitted her of all charges (Amnesty International 2014, 19; Front Line Defenders 2017). Thus, such criminal proceedings do not necessarily violate the right to due process. Indeed, many repressive measures in the natural resource arena can, and do, occur under the veil of the law, such as long periods of preventive detention or long trials that eventually end in acquittal. Focusing only on cases in which human rights to due process are violated would, therefore, lead to

an incomplete picture (Terwindt 2014, 165), as it would exclude many instances in which the law's repressive qualities are used as part of a general strategy to hamper civil society participation.

Even if criminal investigations do not lead to trial or conviction, the mere fact that they are initiated – possibly with pending arrest warrants or pre-trial detentions – can severely damage the ability of NGOs and community members to keep working and speaking out. In India, for example, hundreds of arrest warrants remain pending against community members and local activists in Odisha, severely restricting their ability to move (POSCO Pratirodh Sangram Samiti 2016). Community members have reported not being able to leave their houses or villages for fear of being arrested. Securing access to essential supplies for subsistence and access to medical facilities has also become difficult. In relation to a mining project in South Africa, one community member described the consequences of detentions «after protests that ended up with 25 people being jailed for 11 days and bail to be paid» as «seriously sensitive for some of the detained,» after which «everyone was afraid and did not dare to act anymore.»

Thus, public demonstrations against natural resource development projects can lead to criminal investigations, arrest warrants, and detentions. However, there are other circumstances and types of activities in the natural resource arena that can also lead to criminal charges. For example, a very common occurrence in the Philippines is the criminal prosecution of agrarian reform beneficiaries who, after obtaining legal titles to their lands, are charged with theft or trespass when they enter the land in order to harvest crops (Franco & Carranza 2014). Frequently, such criminal proceedings are initiated due to complaints lodged by former landowners. In one such case, a local lawyer pointed out that «the company filed cases that were freely fantasized. All of these cases were dismissed, as there really was no basis for them.» Not only have community members faced criminal complaints by former landowners in the Philippines, but also implementing officials from the government's Department of Agrarian Reform. In a similar situation in India, the company POSCO filed criminal complaints against community members for re-entering their land, even after the project had been officially abandoned.

Criminal proceedings against project critics can thus seriously hinder them from speaking up, either due to detention or simply for fear of being arrested. Not only does mounting a defense against such criminal charges take time, it also costs a considerable amount of money for defense lawyers, bail, and additional costs related to the proceedings, such as travel costs to and from the court. A community member in South Africa reported that «people have gotten frustrated, intimidated and do not have the force to resist. Protests have gone down seriously since the beginning, due to all the restrictions.» Not everyone, though, is ready to stop resisting natural resource exploitation projects in the face of restrictions, particularly given what is at stake when means of subsistence are destroyed, land is taken, and communities are relocated. When communities and NGO representatives continue to speak out about the possible negative impacts of natural resource development projects and insist on their land rights, they may face physical attacks and even killings.

7.4 Escalation: Physical harassment and targeted killings

The exclusion of communities from information and decision-making related to natural resource development projects can escalate into violence, including the killing of key spokespersons in targeted attacks, often by unknown perpetrators. For example, in February 2017, Edwin Catog – a 44-year-old indigenous farmer actively supporting MARBAI in the Philippines in their fight against Lapanday Food Cooperation for recognition of their land rights – was shot dead. As so often, the perpetrators were unknown assailants on a motorcycle (Anakpawis Party List 2017). The link between such killings and the role that the target played in the opposition to a resource exploitation project is not always easy to prove. Moreover, such links often remain uninvestigated. As an exception, in the case of the murder of Berta Cáceres in Honduras in 2016, the Dutch development bank FMO commissioned an independent fact-finding mission. The experts came to the conclusion that «people in the area lived harmoniously and with no conflict prior to the project commencement,» and that «the project has resulted in serious conflict, violence and deaths within a community, largely neglected by the government, poor, left to its own devices but at peace» (Burger et al. 2016, 21).

The 2016 report of the UN Special Rapporteur on Human Rights Defenders demonstrates that those speaking out about natural resource exploitation are at high risk of personal attacks – including targeted killings – in many countries (Forst 2016). Reports from the organization Global Witness further show that such killings have increased over the last years. Between 2002 and 2013, the organization documented a total of 908 people who were killed for their work on environment and land issues. With 147 individuals killed, the year 2012 saw 10 times as many suspected murders in the natural resource arena than 10 years before. This upward trend continued, with 185 documented killings of land rights defenders in 2015 (Global Witness 2014, 20; Global Witness 2015, 4). Sometimes the moments in which such killings occur clearly correlate to significant stages in a natural resource project's development. For example, in relation to a mining project in Oaxaca in Mexico, an NGO representative pointed out that «killings were happening because now it was about the implementation of the project, about starting the work. Before, it had only been exploration and not yet the stage of commercial exploitation.»

Intimidation and attacks usually target community leaders or NGO liaisons working closely with affected communities. However, a representative of an international NGO has pointed to the worrying trend that family members have also increasingly become targets of intimidation. In addition, lawyers supporting communities in disputes over natural resource projects are often targets of physical assault or intimidating surveillance, as explained by one Philippine lawyer who has experienced such measures. Due to weak state capacities in rural areas, members of community organizations are generally more exposed to physical harassment than members of professional NGOs in urban areas. Women also face a heightened risk of sexualized violence (Forst 2017, para. 19; Barcia 2017). The degree of violence in physical attacks is often higher in rural and remote areas, where local elites retain

vast powers and reporting by independent media is largely nonexistent. Big organizations are less often the targets of threats in relation to natural resource development projects than are peasant women, forest dwellers, or local organizations.

In addition to weak state capacity, a context of armed struggle often contributes to the creation of an environment in which targeted killings can occur. In the Philippines, for example, the UN Special Rapporteur on Extrajudicial Executions has identified military operations against the NPA as a cover under which land rights activists are also being killed (Alston 2008; Van der Borgh & Terwindt 2014, 123–127, 155–157; Shirali 2012). Human rights groups have noted that a new government policy intended to fight Islamist insurgency in the south of the Philippines – only in place since January 2017 – has already been used to attack those defending land rights (KARAPATAN 2017a). Although not as frequent in Odisha as in other neighboring states in India, such as Chhattisgarh, the use of paramilitary forces to combat Naxalite activities is reported to target individual community members and forest dwellers, whose relations to the communist group is far from established.

Such harassment can significantly weaken local organizations, and even lead to their closure. It can also lead to the demobilization of communities facing controversial resource development projects. An NGO representative in Mexico said that «the result of a killing of one community member was the demobilization of other communities, as they also feared being assassinated.» Whereas in some cases killings can lead to fear, demobilization, and desperation, in other cases, people can become more determined to continue their struggle. A community member from the Philippines said, «We ran out of fear. I do not care if I die. It is part of my fight.» Killings can also lead to further public protests and demands for proper criminal investigations. In turn, however, those speaking out against impunity can also become targets for further pressure. For example, in an attempt to silence its critics, the company Desa, which is constructing a hydro-electric dam in Honduras, filed a defamation lawsuit against activists who spoke out about the circumstances of Berta Cáceres' death. In the Philippines, the NGO KARAPATAN and its secretary general, Christina Palabay, in particular, have continuously and publicly denounced the killings of indigenous leaders protecting their territories against mining projects. As a result, Palabay recently became subject to renewed and increased threats by an unknown person, who is assumed to be part of the Philippine military (KARAPATAN 2017b).

In sum, the patterns of pressure on civil society tend to be correlated to the specific stages of natural resource development project cycles. This shows that even though killings are certainly the most drastic threat faced by communities and NGOs, before such killings occur, many communities may have already been intimidated into silence. Killings are really only the tip of the iceberg, which means that support for community members and NGOs should come long before they face physical harassment. It has also become clear that a large number of actors play a role in putting pressure on community members and organizations that speak out against natural resource development projects, ranging from government bureaucrats and police officers to private security guards, company managers, and even neighbors within communities.

The identification of such patterns should serve a better understanding of – and possibly better strategies to counter – restrictions on freedom of assembly and association through protest suppression or burdensome administrative requirements, but also killings, defamation, and fabricated charges. At the same time, such correlations should not be taken too strictly. Depending on the dynamics in different local contexts, killings can and have happened throughout different stages of contestation over natural resource development projects. Criminal investigations can happen any time. Still, the kind of criminal charges and the effects they have on the community or NGO being targeted may be best understood in the context of the relevant stage of project development. Important steps in project development, such as the stage of license approval or the actual beginning of construction work and resource exploitation, are often accompanied by increased pressures on local communities and NGO representatives who are vocal against projects. What communities and NGOs do in order to protect themselves against the pressures described in this section, and how domestic broker organizations and international civil society actors can support them, are laid out in more detail in the next section. In light of the connection between pressures and essential steps in the development and implementation of natural resource exploitation projects, response strategies must take impending steps into account.

8 Designing strategies to defend and reclaim space

8.1 Assessing and designing strategies

When civil society actors design strategies to defend and reclaim space in the natural resource arena, they face a number of challenges. Understanding patterns of restrictions in natural resource development is the first step to devising counterstrategies, as the type and timing of pressures on affected communities and NGOs opposing – or attempting to influence – natural resource development are closely related to particular stages of project cycles. Those actors leading or participating in protests against plans for the construction of a mine, wind park, or dam are the most likely to be targeted through criminal investigations, negative labeling, and defamation lawsuits. In terms of timing, 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. In response to such threats, a wide range of measures and coping strategies have been developed to enable physical and digital security for community-based organizations, NGOs, and their individual members to (re)claim space for organizing and speaking out. These strategies for civil society often rely on the support of governments, national or international NGOs, or intergovernmental institutions. Although many existing counterstrategies work well, they often face inherent limitations. There is therefore a need to consider purposefully combining and developing further strategies.

Lessons learned for defending and (re)claiming civil society space have been collected in a number of manuals and toolkits to guide organizations and communities. Some countermeasures focus on protecting physical integrity and security by providing emergency grants, security training, secure spaces or relocation, accompaniment, medical assistance, or stress-management facilities. Others involve increasing visibility through awards, solidarity campaigns, and monitoring visits (Front Line Defenders 2011; Barcia 2011, 2017). Specific strategies have also been developed to counter administrative restrictions on NGO registration, operation, and funding, and to fend off fabricated criminal charges. While some strategies counter particular types of pressures, guidance has also been developed to explain the availability of support that can be offered by EU missions, UN institutions, and national human rights institutions (NHRIs) (Bennett 2013; Quintana & Fernandéz 2011). The Association for Women's Rights in Development and the Women Human Rights Defenders International Coalition paid specific attention to the particular risks for women who take leadership roles and speak out publicly (Barcia 2011). Thus, much useful

guidance already exists to assist civil society in designing appropriate strategies to counter the pressures they face. Based on the experiences of the interviewees in this study, the analysis here specifically assesses the usefulness and limitations of existing strategies in the context of claim-making in the natural resource arena.

According to the International Service for Human Rights, which is an international organization supporting human rights defenders, when space for organizing and speaking out is threatened, an effective response strategy usually requires a combination of various mechanisms plus the development of a strategy with a long-term perspective (ISHR 2016, 27–29). Indeed, in Odisha in India, communities engaged in the anti-POSCO struggle (Chapter 3) did exactly that. They built strong local alliances to gain public attention for their situation; initiated legal proceedings in national courts to challenge being ignored in participation mechanisms; collaborated in international alliances with other civil society actors to call for corporate accountability through mechanisms such as the National Contact Points of the Organisation for Economic Co-operation and Development (OECD); and engaged with special procedures of the UN to highlight cases of intimidation and attacks.

Although a variety of measures and support mechanisms exist, it can be difficult to assess what is most strategic in a particular situation. In order to analyze such strategic considerations, Van der Borgh and Terwindt offer a useful categorization of existing strategies. Four different types of responses are identified according to the actor (individual vs. collective) and the character of the response (ad hoc/reactive vs. longer-term/proactive) (see Table 1 below). Sometimes, civil society organizations decide to act on their own, for example installing an alarm at the office. At other times, they enter into alliances to create (more) leverage in order to push for change, such as joining a human rights defender network that documents cases and engages in mutual support. Whereas some measures are predominantly ad hoc in reaction to a specific threat, such as going temporarily underground, other approaches have a longer-term goal and are designed to have a structural space-making impact, such as joint advocacy for legal reform. Developing proactive, long-term approaches is difficult and therefore more rare in practice (Van der Borgh & Terwindt 2014, 135–138).

This categorization scheme guides the subsequent analysis, bearing in mind that the present study goes beyond NGOs and also looks at the strategies of community-based organizations and individual civil society activists. Moreover, since corporations play a key role in creating, contributing to, and profiting from pressures on civil society in the natural resource arena, counterstrategies must include business as a separate target. The scheme offered by Van der Borgh & Terwindt can be refined to take these additional elements into account.

As one of the most prevalent forms of defensive responses, affected civil society actors often opt for individual or collective security measures, such as hiring a body guard. Yet, these kinds of reactive measures as well as longer-term, proactive security strategies have limits to their effectiveness. Security measures are often time-consuming, tend to distract attention from political work, and reduce capacities for longer-term strategies. Forced self-censorship or adaptation in communication is

Table 1: Response strategies

	Defensive responses **Dealing with pressures or protecting against the symptoms**	Proactive responses **(Re)claiming space**
Single organization	Immediate and longer-term reactions of an individual organization to experienced pressures (i.e., deny or relativize; leave the country; stop work; change work; self-protection, such as a guard or a fence; submit a complaint for a particular case in order to receive a direct response)	A rights-based claim on other actors for protection or reforms (i.e., request (real) protection of the government; initiate dialogue with those responsible for the restriction; denounce the specific problem in the press; protest, lobby, or go to trial in order to set a precedent; systematically inform the public and international partners)
Coordinated (national/international)	The effort to provide direct self-help in coordination with other actors (i.e., request support from other NGOs; receive security trainings or a legal assistance fund; form a network to deal with specific challenges and develop self-help strategies)	Cooperation and networking between organizations with a view to push for structural change (i.e., form a network or alliance to monitor pressures; develop a longer-term strategy or campaign; set up a collective dialogue with government agencies; send out a collective press release to call attention to the experienced pressures)

Source: Van der Borgh and Terwindt (2014, 135)

another common defensive strategy used by communities and NGOs, but this can result in invisibilizing the extent and nature of the threats and harassment being experienced. Proactive strategies such as going public and demanding accountability can mean exposing victims to more harm. Human rights advocacy – the most prevalent framework to counter pressures on civic space – also has limits when economic interests are at stake or when governments refuse to pledge adherence to human rights. Many of these problems are inherent to the type of strategy and, therefore, to a large extent, are impossible to overcome.

Against this background, it is indispensable to develop additional proactive strategies to counter the specific dynamics of natural resource projects. Given that the types and sequences of pressures are closely related to the stages and actors in the natural resource arena, proactive strategies can push for changing those structures that shape natural resource development and possibly break the vicious cycle of recurring threats and restrictions. Three structuring elements and ways in which civil society actors could change the political opportunity structure to their advantage include focusing on the way in which consultations are conducted (Chapter 9), the role of business (Chapter 10), and the power of the law (Chapter 11).

8.2 The inherent limits of defensive measures

Defensive strategies used by civil society activists and organizations often consist of adopting security measures and engaging in withdrawal, self-censorship, or adaptive language as a means to protect against, or escape, pressures on their space and

physical integrity. Many of the interviewees in this study have used defensive security measures such as avoiding particular places, not traveling during night hours, remaining in constant communication with colleagues, and regularly updating information about one's whereabouts. A local lawyer in the Philippines, for example, had to be brought in a privately rented van from a known and trusted source in order to be interviewed for this study. Although organizations are generally entirely capable of implementing such measures by themselves, they often seek strategic allies. Communities in Mexico, for instance, have reached out to national or regional judiciaries, such as the Inter-American Court for Human Rights, to force the state to provide security guards or increased police protection for individuals or in front of an office or home. NGOs and communities, in particular their leaders, also make use of support mechanisms such as accompaniment offered by groups such as IPON Philippines and Peace Brigades International.

Anxiety and paralysis due to past experiences or fears of future repression can lead to self-censorship, which can manifest in the decision to remain silent, to disguise one's objectives, and to avoid talking to outsiders for fear of being identified. One of the interviewees in South Africa did not want to see his name included in the study for fear of reprisals and generally concluded: «[W]ithout advice from lawyers, I am not going to take action anymore.» Many communities and NGOs choose to adapt in order to fly under the radar of surveillance and restrictions. Some communities and grassroots organizations have changed the wording of their portfolios to emphasize that they work on good agricultural practices, without mentioning anything about the negative impacts of mining or communities' right to self-determination. An organization in Odisha concluded: «We do not openly say we work with communities against extractives. Instead, we do education and training on conservation of forests and the environment, as this is less provocative for government institutions.» There are thus different levels of self-censorship, which range from complete silence to strategic changes in vocabulary to enable continuing the work.

In more drastic situations, people have chosen to temporarily relocate, go underground, or, in worst cases, permanently move from certain regions. One Odisha-based organization decided to abandon its work entirely for fear of attacks. These defensive measures are absolutely necessary when faced with imminent threats, but three inherent limitations should be kept in mind when evaluating their effectiveness.

Security measures are time-consuming

Although some interviewees reported that security measures seemed to be working and made them feel safer, such measures also have clear downsides. Protection measures can be very time-consuming and distract from the work that NGOs and communities want to do. Thus, a Philippine lawyer revealed that he only opts for a minimum level of protection, enough to provide him with a feeling of having done something, but not so much as to disable him from doing his work. Many of the interviewees reported that they actually should be adhering to certain security measures, but they were not willing to make the effort. Many have gotten so used to a

general threat level that they have decided not to always take precautions. It is thus important to keep improving the ease with which security measures can be implemented and followed.

An example of such rethinking is the way in which NGOs organize the relocation of those in danger. Relocation is considered *ultima ratio*, as it often completely uproots the person concerned from their surroundings and leads to their complete inactivity. A women's rights activist in the mining sector in South Africa reported: «It is just like being in prison. Conditions are disgusting. Nevertheless, it was necessary.» NGOs and communities are therefore trying to improve safe places for relocation in order to minimize the negative effects that come along with it. For example, relocation venues are chosen to reflect and resemble the person's origin. In the words of one Philippine NGO representative, «[T]hat means they are still with people they relate to, fellow farm workers, and can continue their work to some extent.»

Withdrawal and self-censorship invariably lead to the invisibilization of pressing issues

For many interviewees who practiced some kind of withdrawal or self-censorship, it seemed to have been quite effective as a strategy to avoid pressures. At the same time, though, in some cases it has actually meant closing an NGO. It might also mean that criticisms of extractive projects or suspicions about the motive of a killing may not see the light of the day. Many instances of attacks, intimidation, or fabricated charges may remain unknown, as they are not reported, or their possible connection to natural resource exploitation projects may not be clearly revealed. In the same vein, international (inter)governmental institutions designed to support civil society actors under pressure, such as UN Special Rapporteurs, may refrain from making clear connections between the political and economic interests driving a natural resource project and the pressures experienced. Even if they strongly condemn a particular human rights violation, their mandate may lead them to avoid supporting the project-opposing claims that the NGO or threatened activists make.

By framing the work of civil society actors under pressure in the natural resource arena in formalized legal vocabulary such as «human rights defense,» the political program, interests, and contestation of such actors are, to a certain extent, depoliticized (Terwindt 2014, 165). Claims about land being usurped for a wind park or mine may thus disappear behind formalistic legal reasoning about a violation of due process or freedom of assembly. Restrictions faced by civil society in the natural resource arena are often shaped by the actors and economic interests behind the resource exploitation project. In order to avoid full invisibilization, civil society actors who choose (temporary) self-censorship and withdrawal can still strategically collaborate with others so that they can highlight the underlying economic interests and patterns of restrictions.

Long-term organizational effects of pressures not sufficiently addressed

Defensive measures have an inbuilt focus on immediate threats. They seldom effectively address the impact that organizations suffer when they lose staff due to killings, criminal investigations, or other forms of harassment. It takes time and resources

to rebuild organizational capacity. For example, a community member in Odisha in India reported what happened after a period of harassment and the arrests of several villagers and staff members of a community-based organization. They immediately reached out to national NGOs as well as international human rights organizations such as Amnesty International and Front Line Defenders, who helped exert pressure, investigate the incident, support their release, and even published a fact-finding report. Some other staff members went into hiding. These measures certainly helped get people out of jail and protect the safety of the others. Yet, it took the community-based organization about three years to effectively adapt to the new situation, reorganize the staff, and redefine their work priorities and strategies.

Most importantly, although security measures and (temporary) withdrawal may be necessary in specific moments of heightened risk, they do not challenge or change the underlying patterns that put those speaking up for their rights at risk in the first place. This limitation is not due to a misconception of the measures. At times, a lack of resources or a delay in obtaining the requested help may aggravate the situation, and flexibility is needed to overcome these problems. However, in general, defensive support is well-designed and needs to remain in place; it is just outside the scope of emergency measures to have a preventative effect. A representative of an international NGO concluded that «these security tools pursue the immediate aim of keeping the movement alive. It is about de-escalation and preserving the movement. Nevertheless, it is necessary to work on both tracks: reactive, but also preventive.» This attitude is shared among local, national, and international civil society actors alike. Accepting the inherent limitations of defensive and immediate response strategies leads to the need for more proactive strategies.

8.3 Challenges to proactive and long-term responses

Although emergency measures thus have their inherent limitations, civil society also runs into specific dilemmas in designing proactive strategies. At times, these dilemmas are specific to the natural resource arena. Existing preventative strategies often rely on visibility campaigns as a tool to raise attention to isolated, but recurring, incidents of pressure, such as physical attacks, fabricated criminal charges, or defamation, in order to reveal underlying patterns. Another common proactive strategy consists of human rights advocacy. As is the case with emergency measures, the dilemmas identified are often inextricably linked to the very essence and strength of the strategy. These challenges are therefore hard to overcome.

Visibility campaigns are selective and risk further exposure

Amplifying the voices of defenders and making their struggles known is believed to increase the political costs of acts of violence against them (Friends of the Earth 2014, 30). Community members and representatives of NGOs therefore try to achieve visibility as a means of protection through urgent appeals to monitoring bodies, engaging the media, or highlighting the important work of specific individuals through awards. In addition to being an expression of necessary and welcome

international solidarity, the spotlight created can provide people and organizations at risk with the necessary backing to bolster legitimacy. A Mexican NGO representative reported that «before the international campaign, when you were looking up the name of one human rights defender on the internet, labels like aggressor appeared. After the campaign, though, the first search results showed him as a human rights defender. That is some impact.» Regrettably, such efforts can often only be taken in a few cases, meaning that many people at risk cannot benefit from the security offered by public exposure.

Moreover, recent developments have fueled doubts about the effectiveness of visibility strategies in terms of protection. The killing of Berta Cáceres in Honduras has provoked reflection on the usefulness of visibility campaigns and whether public attention indeed provides the requisite protective effect. She was very visible, various support institutions had highlighted her situation, and the media's reporting on her work was, at least to a certain extent, positive. Still, her murderers showed no scruples in killing her. In deciding whether or not to go public, civil society also needs to take the risks into account. A staff member of a South African organization working on women's rights raised the particularly vulnerable situation of women by asking: «[H]ow can you publically support without threatening security of female human rights defenders?» There is no easy solution to this problem, as it is naturally context-dependent and has to be assessed on a case-by-case basis. In sum, a delicate balance has to be struck when engaging in visibility campaigns for threatened individuals. Support institutions should be approached strategically, and only once it is determined that requesting protection, for example from government bodies, does not expose the person concerned to further risks (Friends of the Earth 2014, 32).

An additional challenge is that cases often only receive attention when escalation is already underway. According to a staff member of a South African NGO, «[I]n smaller cases, however, media only comes when things turn edgy and violence is involved [...] media support is lacking for these struggles when they remain within the limits of the law.» These are dangerous dynamics that may contribute to the escalation of conflicts when affected communities are enticed to engage in more radical action to create the desired visibility. Community members and NGO representatives have reported how they recalibrate their media strategy and develop their own media outlets as a way to undermine the above dynamics. One South African community established its own news source called Eye News. As a result of constant reporting about the negative impacts of mining activities affecting them and the pressures they faced, urban and more mainstream media slowly began to take account of their reporting and integrated the community's vision into their own publications. Another tool highlighted by community members is independent radio sessions involving the participation of community members in order to make their stories heard in their own words and free from corporate media constraints. Both types of reporting, easily released online, can contribute to creating a counterweight in reporting on conflicts about natural resource development that are not subject to the dangerous dynamics in which mainstream media only covers conflict escalation.

Visibility campaigns are thus a widely employed tool to legitimize and support affected communities and NGOs. However, not all individual cases can be taken up in such campaigns, and some are simply drowned out in the sheer number of attacks occurring worldwide. In addition, visibility for individuals is a double-edged sword to be used strategically and with caution in order not to put individuals at even more risk. Limitations of visibility campaigns can often only be solved on a case-by-case basis, highlighting the need for additional, complimentary long-term strategies.

The limits of human rights leverage on governments

In the struggles about mines, agricultural plantations, and wind parks described in this report, government actors are frequently responsible for restricting the space of civil society organizations and community actors. This is so, for example, when police violently disperse a demonstration, when administrative authorities refuse to give a protest permit, or when the military is involved in extra-judicial disappearances. To counter such pressures, civil society organizations frequently draw on human rights norms to push governments to respect, protect, and fulfill the rights of civil society actors. The human rights framework offers the advantages of near universal recognition and equal rights, regardless of economic or political position.

Drawing on human rights norms to obtain leverage over governments can be done on the basis of domestic as well as international law. In India, for example, opposition to a mine can be defended by pointing to the right to life and livelihood enshrined in Article 21 of the Indian Constitution. If domestic legislation is not sufficient, international treaties can be cited. For example, governmental obstruction of organizing a demonstration can be criticized on the basis of the freedom of assembly, which is recognized in Article 11 of the International Covenant for Civil and Political Rights.

NGOs and communities often turn to NHRIs or an ombudsperson for protection or to seek independent investigations against those attacking community members and NGO staff. For example, a community in Limpopo in South Africa approached the South African Human Rights Commission to highlight the negative impacts of a mining project and instances of physical attacks during demonstrations. The Commission visited the community and mining site, but a community member complained that «they simply concluded that we do not have a strong case and left without any further response or report on investigation results.» The impression that NHRIs are biased and favor business interests was also reported in India, the Philippines, and Mexico.

In order to strengthen the leverage of human rights arguments, NGOs and communities often work in collaboration with other actors in so-called transnational advocacy networks. Such networks serve to put norm-violating states on the international agenda; legitimize domestic opposition groups vis-à-vis norm-violating governments; and combine pressure from «above» and «below» (Risse & Sikkink 1999, 5). For example, after a campaign by an alliance of domestic and international NGOs, the former UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions,

Philip Alston, was invited to the Philippines. NGOs in the Philippines credit his visit and subsequent report as a key factor in exposing the systemic nature – and even reducing the number of – extrajudicial killings of farmers, indigenous peoples, and other outspoken critics of government policies (Alston 2008).

When individuals face intimidation for speaking up for human rights – whether their own or those of others – or when groups are hindered in forming NGOs, they can claim their rights as «human rights defenders.» The specific rights and special protection needs of human rights defenders was first recognized in the 1998 UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (in short: Declaration on Human Rights Defenders). This declaration has led to further developments in the form of the 2008 European Union Guidelines on Human Rights Defenders and legislation at the national level, for example in 2012, when Mexico adopted the Law for the Protection of Human Rights Defenders and Journalists. However, only very few countries have adopted such legislation (Quintana & Fernandéz 2012). When national legislation is lacking, human rights advocacy must operate with international norms, as in the Philippines, where a Human Rights Defenders Law remains a long-standing civil society request, but so far without success.

Although much advocacy is done on the basis of a human rights framework, its leverage depends on governments' public acceptance of human rights norms. In the Philippines, President Duterte regularly produces official statements showing his disregard for human rights and monitoring institutions outside the country (Villamor 2016). Scrutiny of the human rights situation by independent observers has become difficult in this political climate. Michel Forst, the current UN Special Rapporteur on Human Rights Defenders, has tried to visit the Philippines, but so far, he has been denied an official invitation. Transnational advocacy networks therefore have their limits when governments openly reject human rights. As one Philippine NGO representative observed on the visit of Michel Forst: «He came in private capacity, but this doesn't have the same impact.»

Having human rights laws in place does not guarantee norm-respecting behavior. Instead, much depends on these laws' implementation, as human rights norms do not influence state behavior in and of themselves. As one UN representative observed: «The problem is not that governments are not getting the message, but that they are not actually taking it into account». Governments may, thus, only change their behavior when facing sticks and carrots. Plenty of material interests guide governments in their domestic policies as they seek to steer away from sanctions or boycotts, attract foreign investment, and maintain access to international military or economic aid. In international relations, human rights norms are frequently attached to trade deals or threats of sanctions, leading states to «instrumentally adapt» to certain norms. Public shaming can also move a state to adhere to human rights norms. This can be effective when human rights are viewed as foundational norms of state alliances, such as the European Union and the Organization of American States, as states may (strategically) adopt a similar commitment to human

rights norms in order to join or remain part of such a liberal «club» (Risse & Sikkink 1999, 9–10).

Civil society on its own is not always in the position to offer relevant sticks and carrots or create sufficient reach for public shaming. Therefore, NGOs often seek collaboration with foreign governments and their embassies, and they tend to have good experiences with backroom diplomacy. However, embassies and foreign governments are not willing or able to exert the necessary pressure in all cases. Moreover, governments often lack the willingness to include human rights clauses in bilateral investment treaties or other economic negotiations.

In sum, communities and NGOs push governments to respect human rights on the basis of national and international legislation, including laws specifically designed to protect civil society actors in exercising their freedom of assembly and expression. The leverage of such arguments depends in the first place on the existence of favorable laws in the domestic and international spheres. Even when they exist, norm-respecting practices are often lacking. To increase their leverage over government actors, affected communities and NGOs seek strategic alliances, often in transnational networks. Yet, the effect of human rights arguments can be minimal when governments generally abdicate human rights in favor of other interests. Economic interests, for instance, often trump human rights in the natural resource arena. Given these limits, human rights advocacy should thus be combined with efforts to create more structural change.

8.4 Structural change: Consultations, business, and the law

Defensive response strategies against immediate threats are well-developed and available to many of the affected communities and local NGO staff in the natural resource arena. Although such strategies can produce a heightened sense of security, that security is – and cannot be – absolute. The quest for digital and physical security is therefore only one aim pursued by affected individuals and, at times, is sacrificed to engage in activities to further political goals. Security measures are often time-consuming and not enough resources go into rebuilding capacity once attacks and threats have damaged or diminished collective organizational capacities in social movements. Finally, defensive strategies rarely address the root causes of pressures on civil society actors who speak out and seek to influence decision-making related to natural resource development.

In this environment, NGOs and community organizations also choose to make efforts toward changing the political opportunity structure to (re)gain leverage over their governments through proactive and long-term strategies. Yet, visibility campaigns, as one major strategy, and human rights advocacy, as another, have their limits. Visibility is particularly vulnerable to the sheer number of cases present in the natural resource arena and carries the risk of further endangering those affected. Human rights advocacy does not achieve much when governments openly reject human rights norms or when sensitive economic interests are at stake.

The work toward further structural change takes recognition of these limits as the point of departure. Where defensive measures focus on short-term protection, affected communities often continue their activism, despite continuing threats and inevitable future pressures. Strategies that aim to create space that is free from pressure as well as strategies that strive to enlarge the sphere of meaningful influence are interdependent. Being free to demonstrate, assemble, and organize in associations is meaningless if governments remain unreceptive to civil society claims about resource use and extraction. Yet, taking part in decision-making and pushing for influence depends, in turn, on the freedom to do so without coercion, threats, or intimidation.

A closer look is thus warranted at *consultation* procedures, which are at the heart of civil society participation in decision-making related to natural resource projects. The analysis of consultations draws attention to the link between community exclusion from decision-making and the range of attacks on civil society that can be observed in practice. Consultations are a major step in the lifecycle of natural resource projects and, more often than not, trigger pressures on communities and NGOs. Further examination is needed of the particular types of pressures exerted on affected communities and organizations in and around consultations, and of what elements could make them more meaningful as a venue for participation (Chapter 9).

The role of *business* actors also requires more focus in cases where strategies based on human rights leverage over the government meet their limits. Business is omnipresent in pressures on civil society in the natural resource arena, but despite increasing willingness and efforts among affected communities and NGOs, few strategies directly address business actors. This is understandably so. Human rights standards regulating business behavior are less well-developed. Finding out about company involvement in restrictions is difficult when the public disclosure of business information is not necessarily guaranteed and accountability mechanisms are only slowly being developed. It is important, therefore, to analyze what is expected of extractive, energy, and agricultural production corporations when it comes to safeguarding the civil and political rights of affected communities and NGOs, and to pinpoint ways to push business actors to live up to their responsibilities (Chapter 10).

Laws and legal procedures used to quell the dissent of civil society actors when they speak up against particular types of natural resource exploitation also deserve more attention. Many of the possibilities for companies and governments to engage in natural resource exploitation, as well as participation possibilities for civil society, are shaped by international and national laws (see Chapters 3–6). The relevance and use of legal procedures to restrict civil society space is increasingly being recognized. Civil society actors should continue exploring the progressive potential of existing legislation as well as how communities can counter legal pressures and use legal procedures to (re)claim their space and influence (Chapter 11).

PART 4

CHANGING STRUCTURES – ENABLING PARTICIPATION

9 Tackling the root causes of restrictions: Enabling meaningful consultations and community consent

An essential step in the enactment of resource development legislation, policies, and projects is the inclusion of civil society, in particular the affected communities, in decision-making (Chapter 2). Such inclusion reflects the positive function attributed to civil society and has been recognized in international and national norms on natural resource governance. Although such participation can be realized in different ways, one form that has become widespread in law and practice is the so-called consultation, such as the procedure used in Juchitán in Mexico (Chapter 4) or the Gram Sabha hearings in India (Chapter 3). Just as the right to assembly and freedom of expression guarantee civil society engagement, the right to consultation is also supposed to create space for civil society.

For years, (indigenous) activists have struggled to obtain the right to – and actual implementation of – such consultations. Increasingly, though, participants criticize them as hollow exercises used to rubber-stamp extractive projects as being legitimate without actually taking local concerns into account. Current consultation formats fail to provide communities with adequate information or to safeguard them from project proponents' efforts to foment and exploit community divisions, including through threats and attacks. Unaddressed power imbalances and conflicting interests further inhibit meaningful consultation procedures. Continued community exclusion and restricted space in flawed consultations, in turn, can set in motion the destructive dynamics in which community divisions, the defamation of leaders and NGOs, and public protests can escalate into violent confrontations (see Chapter 7). Thus, consultations are part of the overall landscape of shrinking space in the natural resource arena, where affected communities, grassroots organizations, and NGOs face pressures for their attempts to exercise and defend their rights.

9.1 Consultations as conflict-solving and rights-protecting tools

Consultations are one of the primary tools for public participation in natural resource projects used to achieve a balance between national economic policies, entrepreneurial interests, and local visions for development. Scholars have long recognized the conflict-solving potential of consultations. As the UN Interagency Framework

for Conflict Prevention has put it, tensions underlying conflicts between development objectives and community values are less likely to escalate into violent conflicts if those affected can play a decisive role in the decision-making processes (UN Interagency Framework Team for Preventive Action 2012, 13). Yet, conflicts remain widespread. Problem-solving attempts by governments and companies often fail to address root causes and only consider community engagement as a risk-mitigation tool. Thus, even if companies address negative environmental and health impacts, corruption, and the role of private security providers, what communities worry about is losing control over their own destinies, including the land they consider their own (Laplante & Spears 2008).

Tackling the restrictions faced by civil society actors in consultations and asking what a meaningful consultation would look like serves a twofold aim in the debate about shrinking space. First, it addresses particular pressures that occur in relation to consultations. Such pressures primarily concern affected communities, but the space of NGOs may also be restricted when they support affected communities in their quest for meaningful consultations. Second, an analysis of how to move from hollow exercises toward meaningful consultations can provide civil society with tools to build toward the structural change needed to stop flawed consultations from provoking destructive dynamics later on.

Variants of consultations and what is contested about them

Consultation procedures vary in terms of their nature and objectives. In many countries, public consultation procedures are part of environmental and social impact assessments that must be carried out before extractive industry projects can be approved. These consultations enable the public *to voice their opinions*, but decision-making is not made dependent on their outcome. The UN Declaration on the Rights of Indigenous Peoples 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*[21] whenever extractive projects affect their rights, including with regard to ancestral lands or their traditional way of living (FPIC). 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 (*Saramaka People v. Suriname* 2007).

Several countries have expanded the scope of those entitled to such consultations. In Mexico and India, other traditional, rural, or forest-dwelling communities may also benefit from consultation procedures and FPIC, whereas afro-descendant or peasant communities may fall under the ambit of consultation procedures in

21 Article 6(2) of the ILO Convention No. 169 – Indigenous and Tribunal Peoples Convention also requires that consultations are undertaken in good faith with the objective of achieving agreement or consent.

other Latin American countries.[22] A comparison of FPIC for indigenous peoples in different countries reveals significant differences between the available procedures. In Odisha, India, a decision by the traditional councils (Gram Sabhas) is legally necessary for a number of projects. The decision is often taken in just one single meeting. This can be contrasted with the lengthy consultation process that was carried out in Juchitán, Mexico, which was based on new governmental guidelines stipulating five procedural steps:

1) a preparatory meeting and agreement on how the consultation is going to be carried out;
2) several meetings where information is provided to the affected communities;
3) a period of internal evaluation and deliberation;
4) a consultation among the communities, the government, and the company, when this is desired by the affected communities;
5) and finally, an implementation period

(*Protocolo para la implementación del proceso de consulta previa 2015*).

What constitutes an adequate form of community consultation is subject to extensive debate. Although indigenous peoples insist on their right to have a veto on projects they do not support, companies and governments usually highlight that the ultimate decision-making power on the advancement of a project lies with the government, often in the name of public interest. Contention also abounds regarding when exactly the requisite of good faith negotiation is met, what happens in cases where consent cannot be reached, who qualifies as indigenous, and which kinds of projects actually «affect» the indigenous peoples, therefore triggering the need for a consultation to obtain free, prior and informed consent (Barrera-Hernández 2016). Answers to these questions are not easy to find, but they should be guided by the desire to retain the conflict-solving and rights-protecting promise of consultations.

Inadequate consultations and the risk of conflicts

Unfortunately, many, if not most consultations, fail to genuinely seek the input of those affected and, even when their concerns are documented, they are often not properly taken into account. As a Mexican NGO representative observed, «[T]hey are consulting because it is in the law and not because they want to solve the problems. It should not be a consultation just for the sake of consultation.» Flawed consultation may lead to a protracted situation, heightened tensions, and the intensification of conflict (Anaya 2009, para. 36). As an NGO representative in South Africa highlighted, «[C]onsultations that are flawed lead to restrictions of civic space because,

22 This reflects what Goodland argued about the rationale for FPIC being grounded upon the degree to which livelihood and culture are dependent on customary land with «indigenous peoples being clustered at one end, peasant and the rural poor in between and the urban poor less connected» (Goodland 2004, 69; Szablowski 2010, 115).

when people stand up and question what is happening without being consulted, they are attacked and threatened.»

If current consultation practices are not improved, consultations may lose all legitimacy. In the Philippines, some indigenous peoples have already decided not to formally register as «indigenous peoples» out of fear that, once registered, it is easy to fabricate their consent for 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. As one NGO representative in Oaxaca recounted, «[T]he communities have said that they do not want consultations anymore. They say ‹no› to projects, be it mining or hydro-electrics, and therefore do not want to be asked.» Fundamental changes to consultations based on FPIC are needed to prevent them from becoming mere legitimating exercises to push through extractive projects.

9.2 «Prior» also means participation in elaborating (inter)national standards

FPIC is required to be «prior» to any measure that negatively affects the rights of indigenous peoples, raising the question of when consultation should occur in the natural resource arena. If (foreign) banks or investors give loans to an operating company long before the necessary requirements for a project are met under national law, including consultations, how can one legitimately speak of «prior» consultations? Multilateral and bilateral investment agreements also significantly influence natural resource governance, but for now they block public participation. Both Mexico and the Philippines are currently negotiating free trade agreements with the EU, which partly serve to guarantee EU access to raw materials (see Chapter 2). However, civil society involvement in the negotiations is virtually nonexistent. According to a staff member of the IBON Foundation, a Filipino NGO working on economic policies and human rights impacts, «Negotiations are very secret. They are done by the Trade Department. We have submitted data requests, but we did not receive anything.» As noted by the UN Special Rapporteur on Indigenous Peoples, the exclusion of indigenous peoples from the negotiation and drafting of such investment and free trade agreements is in itself a violation of the right to free, prior and informed consent (Tauli-Corpuz 2015, para. 31).

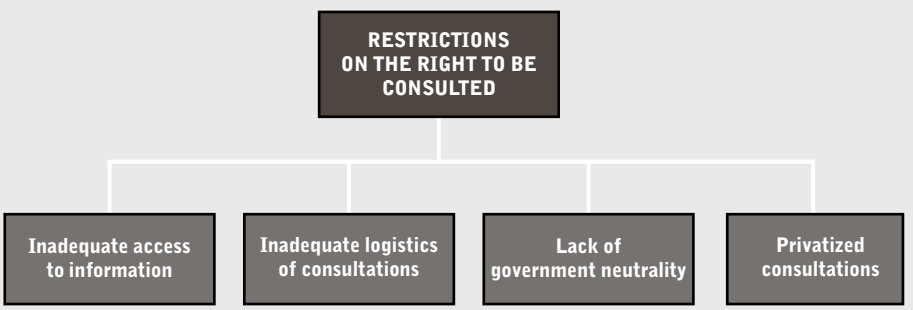
Domestic legislative reforms and planning policies also affect natural resource governance. Even though strategic planning for resource development can have profound, if not immediate, effects on indigenous peoples and the enjoyment of their rights, rarely are they included in planning processes (Anaya 2013, paras. 49–51). Although civil society can, and often does, comment on publicly available proposals and submit statements during drafting processes, in practice many reforms in the natural resource arena get pushed through, despite opposition. In Mexico, major energy reform (Chapter 4) was enacted without any sort of genuine or in-depth national debate about the proposed amendments (UN Working Group on Business and Human Rights 2017, 8). Even though elaborate domestic guidelines provide

for consultations about upcoming wind park projects in Mexico, researchers have asked if it is indeed possible to consider a consultation as being «prior» when «the development framework – of industrial scale wind energy – was not the subject of debate?» (Friede & Lehmann 2016, 89). Real FPIC needs to include formalized and effective means for civil society to influence decision-making earlier than the project phase in natural resource development, including in the adoption of trade rules in multilateral and bilateral fora, legislative texts on extractives, loan agreements, and national and regional development plans.

9.3 The format of consultations should enable community participation

Current experience shows that there are very specific ways in which communities are excluded from genuine participation in consultations for natural resource projects (see Figure 3) and power imbalances are reinforced instead of leveled out.

Figure 3: Restrictions on the right to be consulted



Source: Own chart.

How to appropriately design the format of consultations has been the subject of a number of valuable scholarly contributions (e.g., Barrera-Hernández 2016; Szablowski 2010). The interviews conducted in the Philippines, South Africa, India, and Mexico for this study echo what has been observed elsewhere. Thus, the patterns described here have validity beyond the countries included in this study. The ways in which space for civil society is restricted in consultations almost appear to be a «natural» byproduct of consultations in the natural resource arena.

Adequate access to information

Understanding the nature and extent of the proposed natural resource project on which they are being consulted is essential for affected communities to form an opinion and voice concerns. In practice, adequate, impartial information is rare.

In general, high-level professional skills and connections are necessary to find relevant information. For example, the Centre for Applied Legal Studies in South Africa attempted to obtain 50 Social and Labor Plans for mining projects. Although a few companies did publish them, some companies claimed that such plans are confidential and could not be shared. Often, community access to essential documents is denied by classifying them as sensitive and confidential business information. Some suggest, however, that companies should still share such information with the affected communities in consultation processes as a confidence-building measure (Anaya 2013, para. 66). Notably, South Africa has set up specialized agencies that monitor and grant access to information, which also provide the possibility to file freedom of information requests for privately held documents that are in the public interest.

In addition, the information distributed during consultations often comes directly from the environmental impact assessment, which are done – or at least financed – by the corporations planning the project. Thus, the information provided during a consultation is often either vague or overly technical, and therefore incomprehensible for community members without professional support. The potential benefits of projects are often not openly discussed, and environmental impacts are downplayed. In short, the information is shaped by «corporate science» (Kirsch 2014). The same holds true for government practices of providing information on projects. A staff member of a Mexican NGO working on land rights and dams in Oaxaca highlighted how «employees of the National Commission on Water did not provide transparent, opportune and correct information. Everything is based on rumors and then projects are simply advancing.» Without adequate information, it is impossible for affected communities to effectively assess their options and have a say whether and how a proposed project should proceed.

Adequate design of consultation procedures

A further problem relates to the format, timing, and place of consultations. In India, affected communities reported that consultations took place far away from their places of residence, making it difficult for community members to take part. In addition, consultations often take place too late in the lifecycle of a project and are rarely understood as being a continuous process that should apply to multiple decisions during the development of a project, not just the initial approval. As a British NGO representative working with land rights defenders pointed out, this does not reflect the reality of how impacts are felt among communities, whose real interests and concerns only arises when construction starts and they actually see what is going on. At that point in time, participation rights effectively do not exist anymore. As a way out of this dilemma, some communities have tried to include stipulations in consultation agreements to guarantee their subsequent participation in the execution of projects as well as socio-environmental monitoring to oversee corporate behavior. However, they have had limited success so far (for Bolivia, see Schilling-Vacaflor 2016, 11–12).

Another concern is that women are frequently excluded from engaging in consultations that involve traditional authorities based on paternalistic structures. In South Africa, the traditional authorities representing communities usually consist only of male representatives, even though the law allows for female participation. Many impacts of mining, however, are felt acutely by women, whose daily routines are severely altered once there is a mine in the area. Consultations not only ignore the particular realities of women, but also of indigenous peoples more generally. In many ways, consultations are imposed from the outside. Speaking about the consultation in Juchitán, a Mexican NGO representative reflected, «[T]he consultation is not culturally adequate and, in the end, is discriminatory against indigenous peoples.»

Meaningful consultations thrive on government neutrality

Governments often find themselves in a conflict of interest regarding consultations. They are supposed to ensure a fair consultation process, but at the same time they are also interested in selling concessions. Therefore, many consultations suffer from the government's inability to maintain a neutral position. At the far end of the spectrum, members of the Paudhi Buyan tribe in Odisha, India, faced this reality when they were presented with a fake consultation protocol documenting that they had allegedly given their consent to an upcoming extension for a mining project of the Odisha Mining Corporation. The tribe organized a village council meeting and presented its contrasting result to the government in May 2016, but it never received a response. All too often, consultation procedures are just a bureaucratic step toward obtaining legal approval for a project while the government has already formed its opinion favoring implementation. This conflict of interest is not easily resolved. As one way to secure government neutrality, some communities advocate that other ministries should take the lead in organizing and carrying out consultations. Instead of the ministry for mining or energy, the ministry for the conservation of the environment or protection of rural and indigenous peoples should be responsible for the design and implementation of consultations.

Negative effects of privatized consultations must be addressed

The obligation to consult the affected population is primarily a state duty based on domestic laws and international conventions. States should therefore take the lead in consultation processes, but companies often do. Many companies have come to see consultations as being a beneficial form of political insurance – a cost of doing business justified by the expectation that they reduce project risks (the so-called business case for FPIC). The problem with this approach is that it «commoditizes the concerns of a local community and treats them as just another cost of doing business» (Keenan 2013, 15). Once the industry has invested considerable capital, there is less willingness to accept community rejection of the project.

Strong company involvement in consultations thus presents a number of risks (Kemp & Owen 2017). Yet, in practice, consultations have become entirely privatized

in some contexts, as is the case for companies applying for mining permits in South Africa (see Chapter 6). Even when consultations are primarily organized by the state, communities are highly critical of company conduct before and during the consultation procedure. Community members and NGOs in Mexico and the Philippines reported that money, food, and other promises have been offered by company representatives to persuade them to sell or lease their land and vote in favor of the project. When some community members benefit from job offers, scholarships, or other incentives, they can become strong project advocates, intimidate project opponents, and further escalate community conflicts, betraying the original purpose of consultations.

Getting the format of consultations right is no easy task. Too many consultations do not respect communities' right to information about proposed projects or adequately consider cultural and geographical context in their design, location, or methods. Moreover, power imbalances are fueled instead of leveled out when governments simply delegate consultations to profit-driven business actors. Even when government is present, a lack of neutrality can cause consultations to degenerate into legitimizing exercises for predetermined outcomes. The design of consultations reveals the asymmetric power relations between governments, companies, and affected populations. Faced with powerful interests, communities need to be able to act as a strong negotiation partner, capable of changing or rejecting undesired project proposals.

9.4 Enabling communities to be a strong negotiation partner

A community member in South Africa reflected that «what we really need is a qualitative structure that helps communities to communicate as a collective with the mining companies.» Where such structures do not exist, responsibility lies with the government and the corporate project proponent to nevertheless ensure that all voices are heard and taken into account. Those who consult cannot guarantee that those consulted will speak with a unified voice. Listening to the cacophony of potentially conflicting interests across, and even within, affected communities is the task of project proponents, namely the government and companies. At the same time, the interviewed communities and broker organizations tried to resist divide-and-rule tactics and support, and to maintain or regain community cohesion to ensure their voice was strong enough to be taken into account, despite power asymmetries. A number of strategies for strengthening communities emerged from the interviews.

Countering divisions with strong community structures for inclusion

Divisions are a major challenge for communities when natural resource projects are established in their territories. Conventional models of consultation often presuppose, and sometimes even require, a defined, organized, and functional community (Keenan 2013, 22). Yet, in reality, communities rarely live as a monolithic block. Project supporters and opponents may split into two rival factions, or further fragmentation

may occur *within* opposing camps. Consultations can also foment division among community members by prioritizing representative leaders, who, more often than not, represent their own interests or those of their allies over the community's interests. An affected community member in Limpopo, South Africa, insisted that the whole community, not only the chiefs, must be consulted. As one way to confront divisive practices, an NGO staff member in Mexico recommended establishing community assemblies as a regular practice to agree on clear rules for the division of power between governing authorities and the assembly. At the very least, sufficient time should be reserved to openly discuss traditional decision-making structures and to identify community representatives (Anaya 2013, para. 71).

In order to avoid the legitimizing, co-opting, and divisive effects of consultations, communities have also started to experiment with autonomous consultation processes. Self-organized alternatives to consultations are on the rise in some parts of Mexico – organized by the community, for the community, and without any presence or influence from government or business. A human rights lawyer in Mexico explicitly cautioned *against* recommending this approach to communities, however, given that, due to the lack of a legal basis, the outcomes of such consultations may not be recognized in practice. The success of local, self-organized referendums as a means of withholding consent depends considerably on the organizational strength and unity of the community, as well as its capacity to garner allies and support for its position (Szablowski 2010, 121). The development of so-called community protocols can also serve to document a community's position vis-à-vis an extractive industry project in order to strengthen their position in negotiations (Natural Justice & Heinrich Böll Foundation 2016). Regardless of their legal status, such processes can strengthen community cohesion and ownership, improving chances for meaningful participation in decision-making about natural resource development.

Tackling power imbalances in consultations through independent monitoring

Current consultation models frequently displace the substantive issues at stake, involve continuous miscommunication between parties, and result in the domination of the consulted by those consulting, particularly corporate actors (Rodriguéz-Garavito 2011, 291–295). Government and corporate actors have the advantage of project-related knowledge and experience with prior consultations, thus creating a highly imbalanced bargaining situation. The presence of independent observers can lessen the abuse of consultation procedures and help ensure the genuine influence of those consulted. Observatory missions led by NGOs, such as the one carried out in relation to the consultation in Juchitán, Mexico, are a step in this direction, but they depend on credibility. If an NGO is labeled as «anti-development,» for example, its ability to credibly report on consultations will be limited. International observers may fill the gap, such as UN institutions or representatives of regional human rights institutions. Yet, the planned participation of one UN observer in the Juchitán consultation was abandoned for fear of attacks and the government's inability to guarantee the observer's safety. Thus, governments need to do better in ensuring the possibility of independent monitoring by civil society or international institutions.

Ensuring a level playing field through independent financial resources
Securing a level playing field for all consultation participants requires that consulted communities have access to adequate financial resources. Indigenous peoples in Bolivia, for example, have insisted that they can only assume a leading role in consultations when they are economically supported by the state (Schilling-Vacaflor 2017). As companies stand to make large profits from natural resource development, one NGO representative from South Africa proposed that companies should provide the financial resources needed for consultations. This would tackle the alleged – and often real – lack of government resources to do so. Of course, these funds should be independently administered without corporate interference. According to the interviewee, the companies approached so far had not rejected the idea in principle.

Financial institutions should create the right incentives for extractive and energy companies
The negotiating position of communities should further be strengthened by creating material sanctions for not respecting the community's voice. As one way to create such incentives, financial institutions backing extractive and energy projects should refrain from providing support to projects lacking FPIC from the affected communities (CIEL 2016, 57). In addition, financial institutions could set up a «risk-contingent security bond» that would be paid in advance by the company and reimbursed *only if* no social or environmental damage occurs and contractual agreements are kept. On this basis, keeping promises made to affected communities would be supported through a financial incentive (Keenan 2013, 32; Baker 2012).

Complaint mechanisms could also play a role in putting sanctions into motion. Although such mechanisms do exist, they are too slow to be really meaningful. Still, experience has shown that external monitoring by financial institutions can strengthen the negotiating position of communities and NGOs. This was so in the case of the wind park San Dionisio, which was planned by the consortium Mareña Renovables and funded by the IADB (Chapter 5). In December 2012, community members represented by the Indian Law Resource Center – a regional NGO for indigenous justice in the Americas – filed a complaint with the Independent Consultation and Investigation Mechanism of the IADB. After four years, in September 2016, the IADB Board of Executive Directors issued a public statement in which it agreed that there had been non-compliance with the standards on environmental safeguards, rights of indigenous peoples, and access to information. Despite the long process, a representative of a human rights organization in Oaxaca reported that the external oversight and visit by the IADB to the site of the planned wind park to assess the complaint had played an important role in giving more legitimacy to the claims of those who criticized the lack of a consultation process.

9.5 Accepting the consequences of community consultations

The promise of natural resource development proceedings according to FPIC is that it «allows host communities to meaningfully participate in the decision-making processes, negotiate fair and enforceable outcomes, and withhold their consent to

a project» (Herz & Sohn 2007, 7–8). Current practice shows, however, that consultations rarely lead to affected communities' concerns being addressed and project designs being altered, the adequate sharing of benefits, or decisions being made not to proceed with a project at all. A woman opposing the construction of a wind park in Juchitán, Mexico, said, «Of course we want to do the consultation. It is a right of the indigenous peoples. But it should be real, not like in the neighboring communities. The voice of the indigenous peoples is not heard.»

Incorporating community concerns in revised project proposals

Communities do not necessarily speak with one voice and, frequently, not all members of a community oppose resource exploitation projects. As a community member in South Africa noted, «[W]e are not in principle against all mining, but we should be adequately consulted and our concerns should be taken into account.» Often (segments of) communities may anticipate the benefits of a project combined with adequate environmental safeguards. Yet, of the 30 final consultation agreements Schilling-Vacaflor examined in Bolivia, only two contained substantive changes to project proposals (Schilling-Vacaflor 2017, 1068). This reflects the tendency for substantive issues to be displaced, replaced, or postponed through a focus on procedural steps (Rodriguéz-Garavito 2011, 292). As long as consultations follow a «tick-box culture» – as it was called by one interviewee from the UN – the material concerns of communities will not be reflected in consultation process outcomes.

Monetary and other benefits should be adequately shared

Adequate systems of benefit-sharing for affected communities are severely underdeveloped. As a result of the monetization of land, the most prevalent type of benefit-sharing consists of affected communities receiving money as compensation for their expropriated or damaged land. Monetary gains are, however, also received by communities as a part of sharing the profits of the actual natural resource exploitation. Such financial gains usually exceed the amounts of money communities have ever had to deal with before. Scholars have warned against the irreversible consequences this can have on many communities, as it creates a dependency that erodes social patterns of subsistence (Rodriguéz-Garavito 2011, 292–295). Thus, consultations can be viewed as processes of buying out indigenous peoples' culture, territory, and identity.

Yet, benefits do not always come directly in the form of money. In South Africa, affected communities may receive direct compensation, become shareholders of the company, or receive a certain percentage of the raw materials extracted to use, store, or sell themselves. «[F]or many members of the affected communities, it is precisely the non-monetary aspects of the resources that are the most valuable» (Keenan 2013, 15). Devising systems to better share the benefits of natural resource exploitation is therefore warranted. New schemes may be contractually agreed-upon in order to ensure that companies live up to such promises (see Gathii & Odumosu-Ayanu 2015, 69–94). Former UN Special Rapporteur James Anaya recommends that indigenous peoples independently manage natural resource exploitation through their own

companies, where desired. Community-owned enterprises are already practiced in some parts of the world, and further engagement by states and the international community is highly recommended to provide the necessary skills, knowledge, and regulatory procedures to allow for – and even incentivize – such practices (Anaya 2013, paras. 9–17, 75–77).

Adequate management of financial trusts

When communities receive financial benefits from natural resource projects, solutions are needed to prevent their mismanagement or misappropriation by community chiefs for their own purposes. In South Africa, for example, money generated by a mine in Limpopo was transferred into separate funds: one for individual affected communities, and one for all affected communities together. The first fund is managed by a trust, of which the chief of the community is the principal trustee. When the community realized that the funds were being used irregularly, they wrote to the relevant government authorities, spoke to the bank, raised the issue in a communication to the South African Human Rights Commission, and finally approached the ombudsman to exert influence over the government bodies that had proven inactive. Yet, all of these efforts failed. The situation is similar with the all-communities trust: Not all communities are under the same traditional authority, there is no clear management structure, the first tranche of money took years to be transferred, and, currently, the community members have no idea where this money is. Better care needs to be taken during consultations and as part of local development plans to create adequate structures to manage and oversee the use of financial benefits from natural resource projects.

Not all projects are viable: Governments and companies must accept «no» for an answer

Sometimes the environmental and social consequences of a proposed natural resource project may outweigh its potential benefits, and a community may decide to reject it. UN Special Rapporteur Anaya insists that when communities clearly reject a proposal, a consultation should not be needed, as they have withheld their consent. Yet, a state may still proceed with a project if it can demonstrate that limiting indigenous peoples' rights is necessary and proportional for a valid state objective motivated by the human rights of others. However, «[S]uch objective is not found in mere commercial interests or revenue-raising objectives, and certainly not when benefits from the extractive activities are primarily for private gain» (Anaya 2013, paras. 25, 33–35). Without the ability for communities to fully reject project proposals, current consultation models will always be viewed as a window-dressing exercise.

Consultations are the primary site for civil society participation in decision-making on natural resource projects. Currently, though, civil society's right to take part in consultations is curtailed by a number of restrictive practices. To ensure that communities have a meaningful say in decisions on natural resource development, civil society can push for a number of minimum standards for consultations. First, power imbalances have to be leveled out. Second, the concerns and priorities expressed by affected communities must be respected, including decisions to reject proposed

projects. When communities accept a project, their concerns must be reflected in its subsequent design and execution. Even where safeguards are included, much depends on their implementation in practice, in particular by companies. To date, the company implementation of obligations resulting from consultations is not taking place to the satisfaction of communities. In fact, companies often belie their own promises in subsequent practice. How to deal with business involvement in pressures against NGOs and communities in the natural resource arena is analyzed in more depth in the next chapter.

10 The role of business

In recent years, companies have faced increased scrutiny for their role in the pressures faced by civil society actors who point out negative impacts of business projects (ISHR 2015; Institute for Human Rights and Business et al., 2015). Land-consuming industries, such as mining, agribusiness, oil, gas, coal and dam construction, remain the most dangerous for project critics and human rights defenders (Forst 2017, para. 16). In response, many actors have begun to stress the importance of companies accepting the protection of civil society space as part of their business, particularly in the natural resource sector, where impoverished and marginalized communities are increasingly put under pressure through the demand for raw materials and economic development (Sriskandarajah 2016). Some actors even make a «business case» for why companies should safeguard civil society space. The Business and Human Rights Resource Center argues that companies can expect to profit from an open, rights-respecting society and upholding the rule of law, since it reduces obstacles to registration, enables creativity and innovation, and guarantees a functioning judiciary (Lazala 2017). Human rights defenders can help companies navigate human rights laws and establish risk management procedures, setting the foundation for an operation's long-term security and effectiveness (ISHR & BHRRC [Business and Human Rights Resource Center] 2017). Yet, some companies thrive by intentionally disregarding local priorities and human rights concerns. In such cases, appealing to the «business case» is not enough and civil society must be able to create sufficient leverage to push companies to change their behavior.

Business is all too often viewed as an «outsider,» thus exempting companies from actively preventing pressures or providing effective remedies when civil society space is restricted.[23] Yet, next to states, which bear the primary obligation to safeguard civic space, companies also incur responsibilities. Business plays a significant role in allowing, fomenting, or profiting from the intimidation of affected communities and NGOs. Holding companies to account for their negative impact on civil society space becomes particularly important when states are unable or unwilling to prioritize human rights (see Chapter 8). Such accountability can be secured on the basis of a number of existing standards on business responsibilities vis-à-vis human rights and specific guidelines in relation to human rights defenders and civic space. This chapter analyzes eight existing strategies in terms of how and when civil society has been able to use them to create the necessary leverage over business actors.

23 For example, in Odisha, India, when civil society actors confronted a company after it initiated multiple criminal investigations against project critics, the company manager denied involvement, claiming «everything is taking place between you and the police. We have nothing to do with it. It is none of our business.»

10.1 Company involvement in the pressures faced by project critics

When companies conduct human rights and environmental impact assessments or take part in or carry out consultations, they interact directly with communities. Once a project starts, communities also interact with construction workers, mining employees and private security guards. Through these interactions, companies are directly or indirectly linked to a number of ways in which civic space is restricted and civil society actors come under pressure in the natural resource arena, particularly by fomenting community divisions (see Chapter 7).

Division of communities

Resource projects often lead to divisions within communities, as some community members may be lured by the prospect of jobs and investment in the region, while others may fear environmental degradation and loss of access to their lands. When companies push or manipulate community members to accept their project proposals and publicly denounce critics as not representing the community, they play an active role in dividing communities. Such divisions can cut through region, village and even individual families and have resulted in project opponents being threatened or intimidated by fellow community members invested in seeing the promised jobs and benefits arrive. In some cases, companies have been suspected of employing or persuading community members to spy on project critics. As an NGO staff member in Odisha put it, «These are people who are known as cronies of the company. You better make sure to stay away from them.» Such company informers, whether real or suspected, poison the atmosphere of free debate and open criticism necessary for communities to constructively engage in decision-making about natural resource projects.

Across the countries included in this study, examples abound of companies attempting to persuade communities with financial payments, bribes or in-kind benefits for traditional authorities, such as cars, houses, food, or employment. In San Dionisio in Mexico, corporations paid money to the local municipality for public investments, fueling divisions when the mayor hoarded the money for himself instead of consulting the community (Gerber 2013). In Limpopo, South Africa, companies used opaque selection requirements to award contracts related to an extractive project, leading to discord within the community. In their eagerness to implement a project, companies may also deliberately ignore or recklessly fuel the dividing effects of their tactics to obtain community «consent.» Even after a community had collectively decided to boycott a consultation in Limpopo, the mining company continued to aggressively search for community members who supported the project. Once found, they served as official attendants of the community consultation needed to comply with legal requirements, thus disregarding the community's collective decision. Some communities have found strategies to stop such company bullying. In India, company representatives came day after day to a community in Odisha, painting the supposedly bright future that their proposed project would bring, particularly higher employment. The community responded by registering

each and every visitor and requiring company representatives to provide their IDs and sign a paper confirming their presence, which successfully stopped the aggressive visits.

Business actors cause, contribute to or are directly linked to pressures on civil society space

Public opposition to a natural resource project can lead to delays, injunctions, or even withdrawal of investors. Project detractors may criticize future environmental risks, problematic practices of land lease, or outright corruption in obtaining licenses and project approvals. Corruption is widespread in natural resource development (Publish What You Pay & CIVICUS 2016, 7, 21), especially in countries that are already susceptible to corruption. Although companies benefit when project critics are silenced, proving their involvement in such pressures can be difficult. The role of business actors is clear when they file criminal complaints or defamation lawsuits, but it is hardly ever possible to confirm a company's suspected involvement in the killing of a land rights defender (Global Witness 2017, 9, 11). The UN Guiding Principles on Business and Human Rights (UNGPs) therefore distinguishes between «causing, contributing or being directly linked to» human rights violations.

A clear example of when a company «causes» pressure on civic space is so-called strategic litigation against public participation (SLAPP). A UN representative pointed out in an interview that such lawsuits are easy to file, risk-free for the complaining company, and relatively cheap compared to most companies' revenues. In turn, they directly curtail freedom of expression for civil society opposition, can drag on for a long time (sometimes years) and may force the defendants – whether community activists, lawyers, or NGO staff – to spend time responding to the case rather than doing their work. Defendants in such cases have no easy way out (see Chapter 11). As a preventative strategy, civil society can advocate for laws that prohibit such kinds of abuse of lawsuits against political opponents; these laws already exist in some parts of the United States, such as California. In South Africa, a law is currently being debated to address the rising number of SLAPP suits, especially those against critics of negative environmental impacts of corporate activities (Murombo & Valentine 2011).

Companies «contribute» to pressures on NGOs and community members in many ways. When their private security staff kills or injures protesters (e.g., Global Witness 2017), or the national army or paramilitary forces come in to quell dissent by force, project critics are often silenced. Even if companies are not directly responsible for such human rights violations against civil society actors, they benefit from the results. Due to fear, community opposition to a project may fade away. Business also contributes toward curtailing the civic freedoms of community members and NGO staff when state or private intelligence services engage in the surveillance of project critics and share the results with the companies executing the projects (Publish What You Pay & CIVICUS 2016, 25). Even when company involvement in killings, threats, or intimidating actions (e.g., pistol shots in front of houses, as reported in Mexico) cannot be proven, community members often assume company involvement, which

usually leads to a deterioration of company-community dialogue. These examples illustrate that it is not uncommon for business actors to cause, contribute to, or be directly linked to restrictions on civil society space. As one NGO representative in South Africa emphasized, visibly frustrated, there are no positive examples, there are no best practices, and often there are not even replies when they raise issues with companies. Corporations rarely, if ever, speak out against pressures when civil society actors critical of their activities are killed, threatened, or harassed. This contributes to a climate of impunity.

10.2 Expectations vis-à-vis companies

To hold business to account for failing to respect civil society space in and around their operations, defining expectations toward companies is critical. Existing guidelines on business and human rights, however, fail to specify what is expected from companies in relation to project critics, be it NGOs, community organizations, or activists. In the words of the Special Rapporteur on Human Rights Defenders, «The human rights obligations of business actors have not been articulated as clearly as those of states, and the weak regime concerning the duty of companies to respect the rights of defenders is one factor underlying their vulnerability» (Forst 2016, para. 45). Voluntary instruments provide general standards for business, such as the UNGPs or the OECD's Guidelines for Multinational Enterprises. Given the lack of specific attention to the issue of «shrinking space» in the UNGPs, an NGO representative in South Africa noted that it does not provide an adequate framework to deal with the role companies play in putting pressure on civil society. The most specific and all-encompassing available standard (though, not binding) can be found in the UN Declaration on Human Rights Defenders. By also addressing private actors, it requires that a company act with due diligence to avoid infringing on the rights of human rights defenders and address adverse impacts linked to its business activities and relationships (Forst 2017, paras. 24, 54–72).

Due diligence to identify and avoid risks for human rights defenders

The UNGPs only explicitly speak of human rights defenders as a useful resource for the benefit of the company, but not as actors whose rights also need to be respected by business entities. The process of ensuring their rights is left to states, which, under Principle 26, are required to ensure that the legitimate activities of human rights defenders are not obstructed. The same holds true for current multi-stakeholder initiatives. The Initiative for Responsible Mining Assurance, for example, has established its own «Standard for Responsible Mining» (Initiative for Responsible Mining Assurance 2016), which mentions human rights defenders as a useful resource for gathering and corroborating information.

At the same time, however, the general due diligence requirement under Principle 19 of the UNGPs requires companies to identify, prevent, mitigate, and remedy human rights violations in their sphere of influence, which also clearly includes business impact on civic space. In order to strengthen the implementation of the

UNGPs on this point, two international NGOs – the International Service for Human Rights (ISHR) and the International Corporate Accountability Roundtable (ICAR) – recommend including the protection of civic space and human rights defenders in National Action Plans on Business and Human Rights: «The business responsibility to respect extends to refraining from harming human rights defenders, restricting their rights, or interfering with their legitimate activities and consulting and engaging with defenders to identify, mitigate, and remedy the human rights impacts of business operations» (ISHR & ICAR 2016, 7).

Speak out in favor of space for civil society

In a number of interviews, the expectation was voiced that companies should actively speak out in favor of civil society actors who are threatened due to their criticisms of projects involving the companies. This demand is supported by the UN Working Group on Business and Human Rights (2017). Rather than remain silent, companies could denounce threats against project critics and make it clear that they will withdraw if anyone gets hurt. No example of such kinds of positive behavior came up in our interviews, but a case from the fruit industry serves as an encouraging precedent. The S-Group, a Finnish company, publicly spoke out for Andy Hall, a researcher in Thailand who uncovered labor rights violations of migrant workers in the pineapple industry. Hall was sued for defamation and put on trial for his journalistic work by the company whose operations he researched. The S-Group, a former buyer of the pineapples, decided to openly support him instead of hiding behind the supply chain and even provided testimony on his behalf in the criminal case brought against him (Rankinen 2017).

Human rights defender policy

According to the UN Special Rapporteur Michel Forst, companies should foster a safe and enabling environment for civil society actors and adopt a policy statement on human rights defenders at the senior management level (Forst 2017, paras. 54–72). The «Adidas Group and Human Rights Defenders» policy (Adidas Group 2016), for example, prescribes non-interference with the activities of human rights defenders, including those who actively campaign on issues linked to Adidas' business operations. The company also expects the same behavior of its government and business partners and pledges to act if these actors impinge on the activities of human rights defenders (Adidas Group 2016, 1). Comparable efforts to adopt such policies should also be taken by companies in the natural resource sector, where restrictions on civil society space are abundant, yet comprehensive and transparent policies on how to respect project critics are virtually absent. Some companies in the extractive sector have come out on top of the Corporate Human Rights Benchmark (2017), and the Initiative for Responsible Mining Assurance has developed a standard to respect human rights, communities, and the environment, but an explicit policy on how to protect civil society and project critics is not yet part of these human rights commitments.

Remedy

Finally, corporations are also tasked with remediating past human rights violations, where adequate (Forst 2017, paras. 24, 54–72). Remedy can be provided via internal company grievance mechanisms, but these have often been criticized for their lack of independence. Remedy can also consist of supporting investigations. This was raised by a Mexican NGO representative who wanted companies to collaborate more explicitly with state investigations into the harassment of project critics, whenever the company is alleged to be involved through private security providers on their payroll or local sub-contractors.

Although standards are important to clarify the expectations of corporate responsibility, mere standards are not enough. For example, the Voluntary Principles on Security and Human Rights, signed by governments, corporations, and NGOs, specifically request that companies monitor and investigate allegations of human rights violations by their private security providers. Yet, their implementation is lacking on the ground (Global Witness 2016, 6). Civil society leverage over the business industry to change its behavior requires standards that specify both expectations and adequate implementing and sanctioning mechanisms.

10.3 Making corporations live up to their responsibilities

Based on the UNGPs in combination with the UN Declaration on Human Rights Defenders, companies must engage in due diligence to identify risks for human rights defenders and adopt measures to avoid such risks. Companies should respect the right to publicly criticize extractive projects, start an organization working on sustainable natural resource development, or go to the streets and protest to exercise freedom of assembly. Companies should show respect for these rights in public policy. If civic space is nevertheless restricted and this is linked to a company's business, the company must speak up, internally investigate, support official investigations, and remediate the infringements suffered by NGOs or affected community members. Practice by companies in the natural resource arena lags behind these expectations. Civil society has a number of strategies at its disposal to push companies to change their behavior, in line with existing standards and expectations. The promises and pitfalls of eight such strategies are dealt with below.

Information and campaigning

Naming and shaming through public campaigns can help pressure companies to adhere to their policy promises,[24] based on the idea that public reputation is an important asset for companies. Whereas campaigns are frequently effective in the clothing and shoe industries, they are rarely as successful for the natural resource

24 For example, UK-based mining giant Anglo American has pledged in its «Human Rights Policy» (Anglo American 2014) to respect the UN Guiding Principles, to address both adverse human rights risks and impacts, and to contribute positively to an enabling environment for the respect of human rights. Other companies in the extractive sector have similar policies (see Corporate Human Rights Benchmark 2017).

industries discussed in this report, as they are largely non-consumer industries.[25] Even in the natural resource sector, however, change in corporate behavior may be achieved if the level of public exposure – and, by extension, pressure – is sufficiently high. For many local NGOs and affected communities, establishing the necessary alliances to accumulate this amount of public pressure is difficult. One Mexican NGO representative pointed out that they need international allies to talk to companies at all, as communities fear doing so, given the grave situation locally. The Business and Human Rights Resource Center's «Company Response Mechanism» is a positive step in this regard. It has been used more than 3,500 times to raise local concerns with company headquarters and has a response rate currently around 75% (BHRRC 2017).

Lack of capacity is also an obstacle for local civil society. Not everyone can find out how businesses operate or who to pressure within companies to induce change. Relevant differences exist between professionalized, internationally-operating NGOs and local communities and NGOs. The latter have reported difficulties in researching the foreign investments and complex company structures needed to tailor strategies to leverage companies. One community member in Oaxaca recounted, «[H]ad we known the investors in Gas Natural Fenosa, we would have had a different strategy, but when we tried to obtain information about the investors from the company, they never told us.» Increasing transparency of business operations in the natural resource sector is thus a primary civil society demand. Efforts such as the Extractive Industry Transparency Initiative exemplify the quest to better understand company structures and financial relationships with governments, which also support efforts to counter corruption. As a result of training, one NGO representative working in an umbrella organization for indigenous communities and networks in Asia reported that several member organizations included business' role and responsibilities in their activities, including in submissions to UN bodies. Thus, sharing knowledge and conducting training on research skills are needed to strengthen existing support structures for local NGOs and communities. Otherwise, business will continue to escape scrutiny and, as a consequence, accountability.

Contractual agreements: Beyond words and nice rhetoric

Another way to increase civil society's leverage in natural resource development is to insert specific clauses for protecting civic space in contracts or community development agreements with companies (International Institute for Sustainable Development 2002, 3), similar to efforts to push for more genuine consultations (see Chapter 9). Such provisions could ensure that company responsibilities for safeguarding civic space become binding, but also require support to make sure violations can indeed be sanctioned. In an example of what should not happen, the North American company Newmont concluded three agreements with the chiefs of local communities for its Ahafo mine in Ghana, covering various aspects of company-community relations.

25 The wind park industry benefits financially from being seen as «green energy» and is sometimes an exception to this trend.

However, the agreements explicitly provided for non-enforceability of the rights and benefits contained therein (Gathii & Odumosu-Ajanu 2015, 87–88). Other types of contracts in the natural resource arena – including foreign investment contracts, environmental agreements, and social impact agreements – could also incorporate provisions for civil society. If contracts do not include communities as parties, civil society rights could be guaranteed by incorporating third-party rights (ibid. 2015, 77 et seq.). In any case, good remedy procedures need to be established. The instrument of contractual obligations to respect civil society space can be powerful when companies offer promises to civil society, because such promises are not always kept. As a community member in Limpopo observed, «It is only talk – nothing comes out of it.» Either no changes are made, or they only affect the management level but do not translate into changes on the ground. In addition, talks rarely lead to written documents, making it difficult to rely on them. A Philippine landless peasant similarly said, «They honored what they said as long as they wanted, but there was no written proof and thus no accountability.» Putting such words into contracts can help close the gap between promise and practice.

Pushing financial institutions to gain leverage over business behavior

Companies often lobby governments for beneficial laws or donate to election campaigns to garner preferential treatment. In a phenomenon known as the «revolving door,» government employees frequently change jobs to work for companies, or vice versa. Unsurprisingly, communities and NGOs often view political elites as being aligned with corporate interests. Instead of relying on the government to protect their space, civil society turned to transnational networks and other potential allies to gain leverage over business behavior. A relatively novel focus has emerged on foreign shareholders and other international donors, who are usually difficult for local civil society actors to reach. Targeting the role of investors as a way to achieve behavioral change in companies was a recurring concern voiced in interviews. For example, a South African NGO decided to focus future research on companies and their international connections with shareholders and investors. International civil society networks are emerging out of these local concerns. The network «Rights in Development» has developed a strategy to reach out to investors and international financial institutions, and it has created relevant guidance in this regard (Rights in Development 2016). At the core, this strategy persuades investors to divest or refrain from funding projects when an adequate FPIC process has not been guaranteed, or when restrictions on the political and civil rights of project critics appear throughout a project's lifecycle.

Enforcing such standards can be done through quasi-judicial mechanisms, such as the OECD complaint procedure. For example, a complaint against the practices of South Korean company POSCO in India also addressed the role of the Dutch and Norwegian pension funds that financially support it (more on this complaint below in section 10.3.5). Although POSCO and the Norwegian pension fund refused to participate in the OECD proceedings, the Dutch pension fund turned out to be more open to the arguments. A similar case can be found in the Philippines, where

an organization working on indigenous rights successfully collaborated with South Korean NGOs to engage the responsibility of a Korean investor in a project for the construction of a dam. Realizing the degree of misinformation about the project, in particular the number of affected indigenous peoples, the South Korean bank initiated a review of the consultation procedures and the negative impacts on local people.

Targeting investors also applies to national and multilateral development banks. According to one NGO representative in South Africa, the African Development Bank is part of their increased efforts to tackle financial structures behind companies. In the case of the wind parks in Oaxaca, the IADB was successfully approached by the affected communities (see Chapter 9). The International Finance Corporation (IFC) and World Bank also have remedy mechanisms in place to review the impacts of projects they fund and assess compliance with their standards. However, neither the World Bank's policy safeguards nor the IFC's performance standards pay enough attention to situations in which freedom of expression, assembly, and association are not respected (Human Rights Watch 2015, 18).

It should also be kept in mind, though, that bringing complaints to such institutions can actually put civil society at further risk. In the past, the filing of complaints with these compliance mechanisms have, at times, exposed affected community members even more and led to more pressure, instead of less (Human Rights Watch 2015). To counter this extra risk, the Compliance Advisor Ombudsman, the monitoring body of the IFC, has tabled a consultation draft on its approach to complainant protection in relation to threats or reprisals against individuals lodging complaints against IFC-funded projects (UN Working Group on Business and Human Rights 2017, 5).

Judicial strategies to call on private accountability

Another strategy to deal with company involvement in pressures on civil society is to use judicial means to hold business actors to account for the harm they cause. As one UN mandate holder pointed out, «[T]he threat of being sued in their home jurisdiction is very important for multinational businesses.» As an illustration, 28 Peruvian villagers were detained by the police for three days in 2005 for protesting against the Rio Blanco Mine. While detained, they suffered physical harm through beatings, and female community members were exposed to sexual assaults. The plaintiffs sought compensation from the UK-based company Monterrico and Peruvian Rio Blanco (its subsidiary) for the alleged direct involvement of company personnel in the abuse (BHRRC 2014). In 2011, the claimants received substantial monetary compensation through a settlement with the company. Although the court case cannot undo the attacks, affected community members did receive compensation as a remedy. The case also shows that companies have responsibilities under the law and can be held accountable. It thereby creates a deterring effect and incentives for non-repetition beyond the individual case. Yet, from a community perspective, using the law poses a number of challenges (see Chapter 11). One challenge is that most domestic laws barely recognize parent company liability for the actions of their subsidiaries and,

thus, do not match the patterns of globalized business. All too often, the general principle of the separation of legal personality (the so-called corporate veil) prevents the actions of a subsidiary from being attributed to the parent company, even when the parent company financially benefits, and either has knowledge of the actions or is otherwise involved in the business of the subsidiary. Thus, the Peruvian case is a positive exception that exposes the need for more tools to make corporations live up to their responsibilities toward civil society.

Quasi-judicial mechanisms to ensure accountability

Additional potential for making companies live up to their responsibilities lies in quasi-judicial mechanisms, such as monitoring procedures on the basis of the OECD Guidelines for Multinational Enterprises. National Contact Points (NCPs) based in states adhering to the Guidelines are mandated to monitor implementation of the Guidelines and to deal with individual complaints of violations. The Odisha communities in India have used the OECD procedure to highlight the pressures they faced for their resistance against the POSCO steel project. They filed a complaint with the Dutch, Norwegian, and South Korean NCPs, highlighting not only the responsibility of the South Korean company, but also the Dutch and Norwegian investors behind it. The complaint alleged that the right to be properly consulted was violated and addressed the company's responsibilities for the physical attacks and criminal charges against those resisting construction of the POSCO project (Lok Shakti Abhiyan 2012). The complaint thus made the link between inadequate consultation procedures and the fact that the project critics suffered physical harassment and fabricated charges. According to international observers, the proceedings failed because the company POSCO did not want to take part in the fact-finding investigation proposed as the basis for mediation. Moreover, the Norwegian Pension Fund refused to cooperate, and the South Korean NCP did not even accept the case (Balaton-Chrimes 2015). Still, the NCP procedures offered a possibility for the local community, together with international NGOs, to inform a wider public and put pressure on POSCO. The Dutch NCP's final statement, which established that shareholders – even those who only possess minority shares – still bear a responsibility to prevent or mitigate negative human rights impacts of the company, was also an important outcome of the OECD procedure.

In other cases, NCPs have been more successful in reminding companies of their responsibilities. For example, the UK NCP dealt with the alleged violation of consultation rights of the Dongria Kondh community in Odisha as a result of a Bauxite mine planned by British company Vedanta. Despite Vedanta's refusal to participate in the mechanism, the UK NCP continued the proceedings. At the end, the NCP issued a detailed assessment of Vedanta's failed attempts to respect the community's consultation rights, concluding that a proper consultation had not been carried out (United Kingdom National Contact Point – OECD Guidelines 2009). Five years later, the Indian Supreme Court came to the same conclusion (see Chapter 3).

NCPs are not always as thorough as the one in the UK, though. A negative example is the Australian NCP's rejection of the South African Amadiba Crisis

Committee's complaint about Australian mining company MRC. The complaint was swiftly rejected because the NCP claimed there was no way to obtain proof of the allegations made and because the communities expressly stated that they did not want further negotiations with the company. By following this line of argumentation, the Australian NCP misconceived its role. Instead of rejecting the case, the NCP should have used the occasion to conduct its own research into the facts and properly assess company conduct against the OECD Guidelines in order to define what is expected of companies under current international standards.

In sum, the OECD NCPs offer the possibility to address the whole spectrum of human rights violations present in natural resource struggles. Violations of civil and political rights of protesters can be addressed as well as violations of the right to consultation. Yet, in order to overcome the shortcomings exposed in the above cases, financial resources for investigatory activities of NCPs should be put in place, and clear statements of violations should be published, even when companies refuse to take part in the proceedings. Civil society should carefully select the NCPs to which they address their claims, since different NCPs have different track-records of constructively engaging with complaints.

Complaints to the UN Working Group on Business and Human Rights

The UN Working Group on Business and Human Rights, set up as a result of the adoption of the UNGP, could also play a role in offering remedies through its individual complaint mechanism. The Working Group's trip to Mexico was received positively by local civil society for raising awareness about business and human rights and offering strong support to national NGOs and affected communities in its final report. This was in large part due to the efforts of local civil society organizations, which systematically documented more than 60 cases of abuse by private-sector actors and presented them to the Working Group.

At the same time, however, such approaches should not be overestimated. A Philippine NGO that sent reports on companies to the UN Working Group reported never receiving a reply. Meanwhile, the indigenous partners of another Philippine NGO came to the conclusion that, for the time being, engaging with the Working Group's complaint mechanism was not worth the effort due to limited tangible outcomes. All UN special procedures only have a limited range of options for following-up on individual cases and pushing for change (OHCHR [Office of the High Commissioner for Human Rights] 2008). Much depends on the personal capacity of mandate holders to raise sufficient funds, meaning that financial support to strengthen the mandate of the Working Group is needed. Aside from funding and mandate restrictions, however, the Working Group is currently developing a guidance document that will enable it to offer a forum that can specifically assess pressures on civil society actors as being caused by, or linked to, business activities.

The potential of National Action Plans on Business and Human Rights

Government institutions play a critical role in protecting civil society against restrictions and in guaranteeing a neutral process for the development of natural resources

(see Chapter 8). One step toward governments enforcing business obligations is the development of National Action Plans (NAPs) to implement the UNGPs. Eighteen countries have adopted National Action Plans so far, although none of the countries studied for this report have done so (BHRRC 2017). After the UN Working Group on Business and Human Rights' visit to Mexico in September 2016, it encouraged the Mexican state and civil society to engage in developing a NAP, with a focus on protecting human rights defenders and civil society. However, responsibilities should not be borne only by states where resource exploitation takes place, but also by companies' home states. These states can use NAPs to clarify the human rights expectations and monitoring mechanisms for companies headquartered in their jurisdiction, for example in relation to export credit and investment guarantee decisions.

With the exception of the UK NAP, the plans of other countries do not make explicit reference to the protection of human rights defenders in the context of business activities. The UK NAP provides for the UK government's commitment to instruct its embassies to support human rights defenders, in line with the EU Guidelines on Human Rights Defenders, and to provide funds to support civil society access to remedies for human rights violations and the protection of human rights defenders (UK Government 2013, 2016). Useful guidance on how to frame the issue of civic space in NAPs has already been developed. Business responsibilities should cover respect for – and protection of – civic space, whereas state responsibilities should emphasize the duty to remind companies of their obligations in relation to domestic and, in particular, extraterritorial business activities (ISHR & ICAR 2016).

The monitoring role of national human rights institutions

NHRIs can play an important role in monitoring business behavior, but interviewees expressed frustration at the lack of independence and effective functioning of many NHRIs (see Chapter 8). The Global Alliance of National Human Rights Institutions (2017) has recently set out to analyze and support NHRIs and all civil society actors to effectively play their part in the implementation of the SDGs. Further peer-review of existing NHRI practices in dealing with the issue of civil society space in natural resource struggles should be part of this line of work. In line with the so-called Paris Principles, which form the basis for how NHRIs operate, quasi-judicial competences to address individual complaints should also be developed, both in countries where natural resource exploitation takes place and the home countries of corporations that operate in the natural resource arena. Individual complaint mechanisms at home-state NHRIs would create an additional tool to push for corporate responsibility while avoiding norm-violating host governments. The Global Alliance of National Human Rights Institutions' (2017) support for national institutions under pressure, such as the Philippine NHRI, which President Duterte threatened to abolish if it investigated alleged abuses by security forces, is another tool to influence recalcitrant governments.

Binding rules for business: National and international legislation

The French Vigilance Law (LOI no. 2017-339, 27 March 2017) is a good example of domestic legislation that enables corporate accountability. It requires business to adopt a plan to conduct a human rights risk-assessment for its own operations, its subsidiaries, and the business partners with whom it has a commercial relationship. As a result of the risk assessment, the company must implement measures to prevent and mitigate the risks identified. Civil society can thus use the human rights risk-assessments drafted under the Vigilance Law as a basis to seek remedy for negative impacts linked to the shrinking or closing civic space.

If business is supposed to change its approach in the long run, companies should be seen as an integral part of the dynamic that occurs in the different stages of natural resource exploitation, including frequent restrictions on civic space along the way. Civil society has a number of tools at its disposal to push business to change its behavior. Such behavioral changes can mean that corporations draft a policy on human rights defenders or that a company publicly denounces the intimidation of a project critic, threatening to withdraw if anyone gets hurt. Making companies keep their promises can be facilitated by including relevant provisions in contracts or community development agreements. Support from financial institutions for business must also be modeled to include the protection of project critics and sanctions to be implemented if FPIC is not guaranteed. Lawsuits can have a deterring effect, and quasi-judicial procedures can contribute to establishing case law for what qualifies as company adherence to relevant laws and guidelines. NAPs may be a first step in shining a spotlight on business responsibilities in relation to the preservation of civic space, especially in light of the extra-territorial obligations of states. In the end, though, binding national legislation or a harmonized international treaty is indispensable for regulating business behavior (Open-ended Intergovernmental Working Group on Transnational Corporations 2017).

11 Using legal means to protect and create civic space in the natural resource arena

Laws and legal proceedings play a key role in shaping the stages of natural resource exploitation and the participatory rights for civil society during those stages. Bi- and multilateral investment treaties, mining laws, and national development policies enable governments and companies to access, use, and exploit natural resources. At the same time, international human rights conventions, domestic constitutions, and administrative laws provide NGOs and community activists with the civil and political rights to speak out, organize, and influence such exploitation projects. Companies often make use of litigation as a tool to push for smooth resource exploitation in investor-state dispute settlements or national courts. Meanwhile, governments and companies turn to prosecutors and criminal courts to silence inconvenient voices and «troublemakers.» Faced with an arrest warrant or criminal investigation, community members need lawyers to mount an effective defense. However, civil society need not be limited to such defensive use of the law. Communities and NGOs can also proactively push for judicial recognition of their participatory rights to influence decision-making in the natural resource arena. After the dissolution of a demonstration, for example, social movement leaders may seek legal proceedings to insist on recognition of their freedom of assembly and, thus, secure space for future demonstrations. Civil society can, and should, use legal action to both protect and expand civic space.

Laws that define the possibilities for resource exploitation and those that outline protective rights embody the nexus between natural resource development and space for civil society. How to effectively engage in legal proceedings to push for an open and inclusive space for civil society in natural resource decision-making is, therefore, a pressing concern for civil society actors. In order to maneuver effectively in such legal proceedings, civil society needs knowledge about their rights and access to lawyers. In addition, the judiciary and prosecutors must be impartial, which not only means being free from corruption, but also being adequately protected against intimidation. Where such conditions are not met, civil society is structurally disadvantaged in using the law to defend against legal pressures (criminalization and SLAPP suits) and in making proactive use of the law to enhance civic space (litigation for participatory rights). Over the years, activists have developed a number of strategies to counter undue criminal charges and deal with bothersome criminal investigations. Given the vast array of powers that come with the definition of

conduct as being «criminal,» legal procedures can easily be used to curtail civil and political freedoms and to paralyze future civil society action. Effective legal response strategies can include trial observation, mass surrender, and judicial review.

11.1 The role of the judiciary in safeguarding civic space in the natural resource arena

The trajectory of the Bathlabine community in Limpopo, South Africa, illustrates the relevance of legal proceedings, both defensive and proactive, in defending and enlarging space for those criticizing a mining project (see Text Box 5). In this case, due to local opposition to the mine, legal support was needed to defend community members against libel charges. In addition to successfully fending off the libel allegations, the strategic, proactive use of legal procedures, combined with media attention and community mobilization to eventually stop the mine, even led to the arrest of its director (Mail and Guardian 2014).

Legal action in the Bathlabine community in Limpopo, South Africa

The Bathlabine community was confronted with a clay mining project of Blue Platinum Ventures in 2005. The mine's operations encroached on sacred sites and caused environmental degradation. Community attempts to find out more about the mine through the traditional authorities led to no results. One community member then decided to set up a network that included environmental lawyers. Negotiations with the company led nowhere, but the company sued the founder of the community organization for damage of reputation (2 million South African rand – about €122,000). The founder thus needed to defend himself against the allegations. Assisted by a lawyer from a South African NGO, the case was dropped. By going to court, the organization obtained access to the environmental impact assessment and management plan. They then learned that the mining operations had actually started without the required environmental permit. The community organization decided to take proactive legal action and filed a criminal complaint against the directors of Blue Platinum Ventures. The organization simultaneously set up a local newspaper to regularly report about the case, which eventually led to interest from the urban mainstream media. The court case against Blue Platinum Ventures and several of its directors began in earnest in 2013. As a result, one director faced a suspended sentence of five years in prison on the condition that the environmental damage resulting from the mining activities was repaired. After no rehabilitation took place, a subsequent case was taken to the High Court, in which the judge found the director in contempt of court due to his inactivity, and ordered the company to rehabilitate the area.

Legal defense against legal pressures

When companies and governments use the law to curtail civil and political rights through criminal investigations or SLAPP suits against activists and NGO staff, civil society is involuntarily drawn into legal proceedings. A South African NGO representative made clear that they had to seek legal support for the sheer necessity of guaranteeing the continuation of their work: «We need legal representation to know that we have a legal defense if the government or the corporation retaliates for doing a certain action.» Project critics may also face false accusations or trumped-up charges. A community organizer from the movement against the POSCO steel project in Odisha, India, revealed that «in 2014, after the march against the POSCO office took place, about 500 criminal cases were filed by the company. More people were charged than had effectively been there.» On the basis of these charges, hundreds of community members have arrest warrants pending against them and may spend time in (prolonged) pre-trial detention. As a result, community members have reported not being able to leave their houses or villages for fear of arrest. Securing access to essential supplies for subsistence and access to medical facilities has therefore become difficult. A staff member of a South African NGO also recounted community experiences with aggressive legal pressures in Limpopo: «Mining companies currently take advantage of the fact that communities are poor and that they do not have good access to legal defense. So they can shut them up by using the law. In that sense, litigation helps to push that move back, to say, look, there is legal support. However, litigation is reactive for the time being and I would like it to be more proactive.» Thus, legal procedures are necessary to defend against legal restrictions, but also needed as a means to proactively claim rights in order to protect and enlarge civic space.

Proactive use of legal proceedings

Where international and national laws recognize participatory rights, civil society can proactively claim and enforce their rights to FPIC, public consultations, and access to relevant information. Civil society has obtained important legal successes in this regard. For example, the San Dionisio community in Mexico had a judge suspend a planned wind park after they successfully argued that their right to FPIC had not been respected (Chapter 4). Civil society can also decide to litigate to obtain information about a proposed project. In South Africa, the Bathlabine community that resisted the proposed mine of Blue Platinum Ventures only obtained access to the project's environmental impact assessment through the use of legal proceedings (see Text Box 5). Other affected communities in South Africa who have been stopped from proceeding with demonstrations due to administrative authorities creating overly burdensome requirements have turned to courts to claim their right of peaceful assembly. Equally important are legal procedures to push for the recognition of the right to start an NGO (right to freedom of association). Thus, NGOs in India have gone to court in an attempt to repeal restrictions of the Foreign Contribution Regulation Act on obtaining NGO funding (Amnesty International & Human Rights Watch 2016; Amnesty International 2017a).

Judicialization of politics

Natural resource governance is a deeply political process that involves weighing multiple interests at different scales, including trade, investment, environmental, social, and labor interests at the local, national, regional, and international levels. This political process takes place in a framework that is shaped by a large number of laws and regulations. Thus, companies and governments, as well as NGOs and communities, turn to different legal proceedings if decision-making gets stuck, if they disagree with the decisions taken, or if they are excluded from the decision-making process altogether. In the resulting court proceedings, judges often have to tie up the loose ends of legislation and provide concrete answers when concepts are not clearly defined. «Public interest» is one such concept. For example, a government may argue that a particular project should go forward because it is in the public interest, thus overriding the particular interests of a community. When courts recognize that natural resource projects serve national development goals, project critics are easily stigmatized as being anti-development or backwards (for one example, see Rajagopal 2005, 203–204). Paradoxically, when a commercial project using natural resources is deemed to be in the public interest, civil society space to participate in decision-making is usually limited.

Globally, social movements and civil society have increasingly begun to proactively use legal strategies to generate social change, which is a development highlighted as an aspect of the so-called judicialization of politics (Sieder et al. 2005). Strengthening community voices and participation rights through legal procedures has also been called the law's potential to create «counter-hegemonic globalization from below» (de Sousa Santos & Rodriguéz-Garavito 2005). However, companies and governments are often better positioned to use legal procedures to secure their interests. They generally possess more financial resources, knowledge of the planned project, and have easier access to lawyers. Launching criminal allegations against civil society critics is relatively easy and risk-free for the filing party, whereas pending criminal investigations can severely hamper activists and organizations. To ensure that legal tools can strengthen civil society's voice and participation rights, it is essential to improve the legal opportunity structures in particular contexts.

11.2 How civil society can make better use of law to protect and create space in the natural resource arena

Interviews reveal that community members are often skeptical about the added value of using legal procedures. Law was often considered as something risky, to be used with caution, mostly due to past negative experiences. As one landless farmer in the Philippines explained, «We have never tried to use legal means and to go to court. We were unsure if this is the right way and, based on experiences by others, it was rarely successful.» Of course, going to court is no guarantee for success. Yet, some aspects that make communities shy away from using legal procedures can be specifically targeted by improving their access to courts and raising their chances of a fair and receptive judge. The following graphic shows four aspects that are highly

relevant for communities to make better use of legal procedures, both in case they involuntarily need to defend against allegations as well as when they proactively include legal procedures in their strategy to protect or enlarge their space for organizing and speaking out.

Figure 4: What civil society needs to make better use of legal procedures

Source: Own chart.

Know your rights

Communities frequently lack knowledge of laws that – at least on paper – provide them with protection, be it the rights of those marching in a demonstration or the rights of indigenous people to consultation. A lawyer in the Philippines said of landless farmers' attempts to implement land reform and resist large-scale corporate agribusiness, «Farmers actually do not know their rights and the guarantees that the law provides them. They signed contracts and accepted conditions whose consequences they could not entirely grasp.» They are, thus, excluded from having a meaningful say in natural resource development for the simple reason that they lack knowledge of their rights.

Key knowledge support is offered by quite a number of international NGOs and networks as well as national organizations through educational activities and know-your-rights seminars with local organizations and activists. In the Philippines and South Africa, the knowledge gap is also bridged by so-called paralegals, who possess a certain level of knowledge about the law and its proceedings, are closely affiliated with – or even members of – the affected communities, and establish relevant connections to urban and national NGOs. Albeit lauded for the positive role they play, the number of paralegals in South Africa has declined in recent years, which is cause for concern. As highlighted by one NGO representative, «[Y]ou need these people who are in the communities, on the ground and know the law, and at the same time, talk to people. In terms of impact, their presence protects communities and creates space for communities to act. They are also the interface with lawyers and they are

telling companies what communities' rights are.» In order to reverse this situation, national and international civil society organizations and governments have a role to play. They must continue and enhance their efforts to conduct, facilitate, and fund legal training, and also support efforts to strengthen the institution of paralegals, who play an important role for local civil society, be it communities or grassroots organizations.

Securing access to lawyers who operate free from pressures

Communities and local NGOs affected by restrictions on civic space tend to have difficulties in getting access to lawyers. Frequently, there are simply not enough lawyers to deal with the number of cases involving criminal charges or violations of consultation rights. In Limpopo, South Africa, an NGO representative highlighted a more specific problem: «[T]he big mines bought all the law firms in the area. So wherever you go, all law firms are employed by them and have a conflict of interest and do not support you, as they are their clients. It is a huge problem to get access to lawyers.» Restrictions on civic space in the natural resource arena frequently take place in remote and rural areas, where lawyers may not be based. Travel, which involves costs that communities and local NGO staff cannot afford, is often needed to even initiate contact with lawyers to get court cases going. Some existing emergency funds for civil society actors under threat already foresee the possibility of using resources for legal defense, such as the Lifeline Embattled CSO Assistance Fund. However, such support is usually limited to small grants that enable legal representation in urgent cases of criminal accusations. Existing funds rarely deal with the proactive use of legal procedures to claim participatory rights, which tends to take longer with less secure outcomes.

Defending against unfounded arrest warrants and initiating legal action for access to documents on behalf of poor rural villagers or financially strapped NGOs is not a very promising business for most regular lawyers. Adequate legal representation for communities and NGOs is thus essentially excluded from the prevailing economic business model of the legal profession. Consequently, a South African community member in Limpopo accused lawyers of only being interested in money, asserting that «they are no different from the mine itself. They are all the same, including the ones working for NGOs. In the end, they want money for their funding. They only come after those cases where media attention is high and the damage has already occurred, so that they can use the story in order to attract funding. But that does not help, because the next person will be individually affected. They do not offer legal help to prevent reoccurrence of the problem.» As this interviewee highlights, even when NGOs fill the gap left by regular law firms and engage in litigation to defend and support civil society, they may not be able to secure funding for all types of cases. Increasing funding for such NGO work is thus a critical priority for donors supporting legal action to secure civic space in the natural resource arena.

When independent lawyers or legal NGOs take on cases to safeguard civic space in the natural resource arena, they run the risk of becoming subject to all types of restrictions themselves (see Chapter 7). International NGOs have developed support

programs specifically for such lawyers. For example, the Dutch Lawyers for Lawyers foundation has produced a number of reports on the dire situation of lawyers in the Philippines (Dutch Lawyers for Lawyers 2006, 2008). Still, such international solidarity cannot always provide hands-on support. A Philippine lawyer who defends affected community members in the natural resource arena – who was also himself the subject of threats, attacks, and criminal investigations – said that what helped him most was a network of Philippine lawyers mutually taking care of the cases filed against their fellow lawyers. As he put it, knowing that someone knowledgeable and familiar with the situation was watching over his case (filed against the lawyer) was the most reassuring and, simultaneously, most effective method to enable him to continue working.

In sum, civil society access to lawyers hinges on a number of problems. Communities and grassroots organizations lack the necessary resources and connections to find appropriate lawyers in their vicinity. Funding schemes should also be made available to communities for accessing more legal support, especially for proactive litigation strategies. Finally, additional support for the protection of lawyers already engaged in supporting communities and NGOs is needed. Designing such support should follow the needs of those affected and include, in particular, the strengthening of lawyers' networks within the countries where restrictions take place.

Protection for impartial judges and prosecutors

Even if cases are brought to court, there is no guarantee that judges are impartial. An NGO representative in the Philippines commented that «in 90% of the cases, the local judiciary will side with the powerful land owners anyway.» After physical harassment and killings, there are hardly ever successful prosecutions against the perpetrators, leading to an environment of impunity and a lack of deterrence. In India, the campaign coordinator against the POSCO steel plant noted, «We would like to do counter-cases against companies and people have advised us to do so, but if the police are in the hands of the company, what is the use?»

Although corruption in the natural resource sector may play a role in the inactivity of the police, prosecutors, or judges, it should not be forgotten that these authorities can also face harassment and intimidation if they oppose powerful interests and seek accountability for project critics who have been harassed or killed. An example from Indonesia serves as a reminder of the reality of such harassment against the judiciary. A judge convicted Tommy Suharto, the son of the country's former president, on corruption charges. After the trial, and after refusing to accept a $200,000 bribe, the judge was killed in broad daylight in Jakarta (Van der Borgh & Terwindt 2014, 103). Despite facing real risks, there is hardly any support for judges and prosecutors in such contexts. According to a lawyer working on land reform cases in the Philippines, even though active prosecutors are indeed threatened in the Philippines, they hardly receive any institutional support in response to such threats. The Philippines' National Prosecutors Association does not address instances of harassment against its members and, although the National Union of Peoples Lawyers does provide lawyers with support in cases of intimidation, threats, and attacks,

it does not do so for prosecutors. International networks of lawyers and judges could raise attention about the need for such protection in order to guarantee the impartiality of judges and prosecutors.

Enhancing receptivity to claims

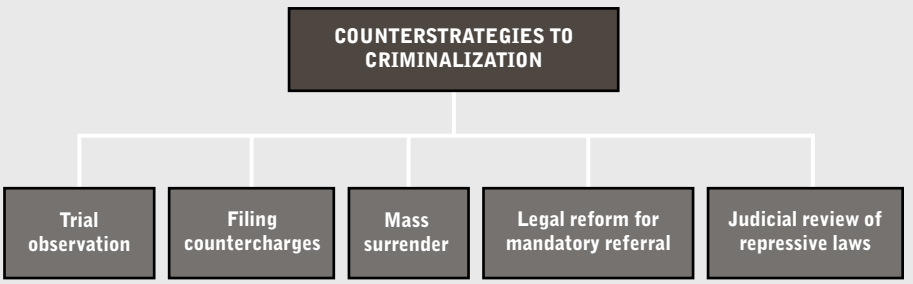
In the end, the legal opportunity structure consists not only of *procedural* aspects related to access to justice or legal funding, but it also depends on the receptivity of the judiciary to the policy arguments at stake (Hilson 2002, 239). For claims to have a chance in court, they must be deemed legitimate. Countering stigmatization and backing up the arguments and narratives advanced by civil society with influential voices is crucial. Through strategic alliances, civil society can seek backing from well-respected institutions that publicly support their claims.

All in all, civil society organizations tend to be at a structural disadvantage compared to corporate and governmental actors when it comes to using legal procedures in relation to natural resource development. Affected communities and grassroots organizations need additional support to more fruitfully use legal procedures to protect their civil and political rights and safeguard space for participation. Such support should focus on know-your-rights education, increase access to lawyers, and ensure financial resources for proactive as well as defensive legal initiatives. It should also include institutionalizing support for prosecuting authorities and the judiciary to maintain their independence, and providing public legitimization for civil society claims to increase receptivity to their arguments in court.

11.3 Defending against abuse of criminal law: Counterstrategies to criminalization

Criminalization is a widespread feature of contestation in the natural resource arena (Rojas Paéz & Terwindt 2014). Criminal complaints and proceedings can be used to hinder and silence political opponents by means of overly broad criminal offenses, preventive investigations, and trumped-up or fabricated charges (Terwindt 2014). Such practices are more common in places where the police, prosecutors, and courts may not be independent, which is the case in some rural areas of the countries studied in this report, such as Mindanao in the Philippines. Organizing legal representation is, therefore, not always sufficient to avoid this type of criminal investigation and its consequences. Civil society experiences with such abusive applications of criminal law and procedure has led to a number of counterstrategies (see Figure 5).

Figure 5: Counterstrategies to criminalization



Source: Own chart.

Trial observation

An important effect of criminal charges is the discrediting of the defendant (Terwindt 2012). To counter such de-legitimization, trial observation has proven to be an effective method. When prosecutors choose to trump-up charges in order to obtain easier access to pre-trial detention, an independent and publicized monitoring of the trial by representatives of foreign embassies in the country or staff of international NGOs may force prosecutors and judges to respect the limits of the law. By scrutinizing the judges and prosecutors, observers pressure them to carry out their functions in a responsible manner, express public concerns about the fairness of the proceedings, and give the defendant, the defense attorney, and other supporters a sense of legitimacy and renewed confidence (OHCHR 2001, 285).

In the Philippines, the organization IPON engages in trial monitoring and submits short reports on specific trials to embassies and EU missions in order to draw international attention to the cases. According to the EU Guidelines on Human Rights Defenders, EU missions can undertake trial observations as part of their work (European Union 2008). However, our calls to the EU mission in India for supportive trial monitoring remained unanswered in relation to criminal charges and pending arrest warrants against hundreds of community members in Odisha after their public protest against the POSCO steel project (Chapter 3). Additional civil society organizations, employees of foreign embassies, and staff of international governmental institutions could engage more actively in trial monitoring to support project critics in the natural resource arena against the abusive use of the criminal law apparatus to stifle civil society expression and space.

Filing charges against those threatening and intimidating project critics

An organization in Mexico developed the strategy of filing counter-charges against those responsible for threatening project critics. A representative of the NGO in Oaxaca reported that they started doing this when it became clear that those opposing

wind parks had many criminal complaints pending against them, while the wind park proponents behind the threats and intimidation had none. Thus, in order to «balance the accounts,» as the interviewee put it, the NGO supported movement leaders in filing complaints in response to incidents of threats or harassment. Even though the complaints were not properly investigated by the prosecutor, the NGO representative concluded that it supported the movement leaders psychologically to know that they were not only the object of charges, but that they could also file charges for harm done to them. Thus, despite the lack of real prospects for having the perpetrators prosecuted and sanctioned, counter-charges can produce a sense of legitimacy for those filing them. In addition, criminal counter-charges are relatively easy to prepare and do not require paying a court fee. In cases where the police, prosecution, or the courts are not reacting adequately to charges, the lack of independence or prevailing impunity may be exposed to the public or brought to the attention of human rights monitoring mechanisms at the national and international levels.

Mass surrender

In addition to support in specific cases, counterstrategies are needed that prevent future criminalizing tactics. Community members in the Philippines have successfully used the tactic of «mass surrender» to draw attention to the mass nature of criminal charges against landless peasants pushing for the implementation of genuine agrarian reform. In one instance, 132 farmers in the Bondoc Peninsula faced criminal charges for qualified theft, libel, and trespassing on the very lands that had been awarded to them under the agrarian reform program. They collectively surrendered at the national police headquarters in Manila to raise awareness and finally overcome the fear and anxiety that accompanied living with pending arrest warrants. As a result of the mass surrender, lawyers and politicians assisted the farmers in getting most of their charges struck down. Due to the national attention, local police also stopped arresting peasants. Most importantly, and partially due to this tactic, legal reform was initiated to prevent such tactics of criminalization in agrarian disputes (Franco & Carranza 2014, 59).

Legal reform for mandatory referral

The above example shows that highlighting the scale of criminal charges and the connection to economic and political programs can be necessary in order to reveal the problematic nature of using criminal charges against opponents in the natural resource arena. Legal reform was initiated that stipulated that criminal cases relating to (potential) agrarian reform beneficiaries should be dealt with in the department of agrarian reform, not in criminal courts. The impact of this move on the space of communities and their organizations should not be underestimated. In criminal courts, farmers usually needed to pay a high bail in order to be released from pre-trial detention. All too often, farmers would not be able to post the required bail and would languish in jail for years without conviction, often on questionable charges. Alternatively, farmers would decide to go into hiding in order to avoid such

detention and, thus, be removed from their families. With the mandatory referral to the department of agrarian reform, criminal charges can be withdrawn as soon as it is recognized that the disputed land is actually subject to the agrarian reform program. Allegations of theft then become moot, as «no one can steal from his own land,» as a Filipino lawyer put it.

A subsequent proposal for extended law reform in the Philippines shows how such referrals can be done even more effectively. The proposal aims to effectively contribute to the quick resolution of false accusations and trumped-up charges related to land reform disputes. As explained by a member of the department of agrarian reform, the proposal rests on an entirely new legal procedure («*amparo agrario*»), which combines land claims and the defense against criminal charges in a single legal action. The advantage of such a claim lies in its ability to analyze criminal charges in the context of the political dispute that led to the charges. Advocacy for similar legal reforms in other countries – as well as for expanding it to disputes about mining or energy – can, thus, be a promising strategy to counter the use of criminal procedures to hinder and silence project critics in the natural resource arena.

Judicial review of repressive laws

A preventative legal approach can also focus on the removal of problematic criminal provisions. A good example of such proactive intervention comes from Indonesia, where judicial review of the Plantation Act was successful. The judges declared a problematic clause of the law unconstitutional; the clause had been used as the basis for criminal proceedings and imprisonment of forest community members in land disputes (Van der Borgh & Terwindt 2014, 159). This strategy can change the situation not only in a single case, but also for future cases. The possibility for civil society to use judicial review depends on the relevant legal system. Where a jurisdiction allows for public interest litigation, as is the case in India, anyone can ask that a law be repealed without the prerequisite that they be personally affected by it. In other countries, one must be personally affected by the law to have standing in court.

In order to strengthen such petitions, civil society can seek strong allies. For example, the UN Special Rapporteur on the Freedom of Assembly and Association has intervened in legal proceedings about the constitutionality of the South African Gatherings Act, a law that often unnecessarily hampers public demonstrations (see Chapter 6). In the particular case, protesters took part in a spontaneous demonstration without notifying the government, for which they faced severe sanctions on the basis of the Gatherings Act (*Mlungwana et al v. the State*). The judicial review challenged the constitutionality of this restriction on their right to assembly. The position of the petitioners was supported by the official intervention of the UN Special Rapporteur in the form of an *amicus curiae* brief (Kiai 2017). Other UN authorities could also support civil society through proactive legal interventions such as the UN Special Rapporteur on the Independence of Judges and Lawyers or the UN Special Rapporteur on Human Rights Defenders.

11.4 The inherent limits of judicial proceedings: The challenge of implementation for court orders

To a certain extent, laws shaping natural resource exploitation also determine civic space in natural resource decision-making. Communities and NGOs that attempt to defend against repressive use of the law or to enforce participatory rights, such as access to information or the right to be consulted, face a number of structural disadvantages. Communities and NGOs must have better access to training and knowledge about their participatory rights in order to claim them. Access to lawyers has to be improved by establishing stable funding schemes for judicial action and by pushing for more lawyers and paralegals, particularly in remote and rural areas. Lawyers engaged in such work should themselves be supported against restrictions and harassment, as should judges and prosecutors whose independence is threatened through intimidation and attacks. For the particular case of criminalization, counterstrategies are needed to support affected persons and their defense lawyers. Trial monitoring by international NGOs and foreign governments, including their embassies, is one such option, as are tactics such as filing counter-charges or organizing a «mass surrender» accompanied by a strong push for legal reform. Judicial review procedures that challenge criminal provisions that structurally obstruct civil society from exercising its civil and political rights should be initiated and supported by international institutions, such as UN bodies dedicated to the protection of civil society or human rights defenders.

A final caveat needs to be highlighted, however. Even if a judge issues a favorable order, in remote and rural areas, the enforcement of judgments may be illusory due to the government's lack of power in the locality. Thus, as a Filipino lawyer asked, «[W]ho guarantees that a court order which declares surveillance, intimidations or attacks as illegal will be followed?» Ensuring effective implementation and enforcement of such legal decisions is essential, but is easier said than done. Even when laws are precise enough and provide for the rights of civil society to influence decision-making about natural resource governance, implementation is often problematic. As one South African community member in the Limpopo province summarizes, «They only set up the laws that should make the company communicate with the community, but in fact they never do.» As a consequence of the increased number of laws worldwide, de Sousa Santos observes that the gap between law-in-books and law-in-action has widened (2006, 4). Although law can, and sometimes needs to, be used – and the above strategies certainly enable communities and NGOs to do so more effectively – a critical note is also important. Natural resource governance is political and needs to be recognized as such. The increased codification and use of legal procedures should not distract from the need for further political debate to assess different visions for development and push for its acceptance and implementation. Thus, a South African member of an anti-mining network cautioned, «Lawyers can only argue in terms of the law, but the communities must be at the forefront of their cases and be visible and demonstrate.»

12 Lessons learned

Berta Cáceres was one of many activists killed over the past few years while attempting to meaningfully participate in decision-making about natural resource projects. Disputes about natural resource governance are characterized by a high number of killings. 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 their voices heard.

The examples of natural resource governance in India, Mexico, the Philippines, and South Africa show how laws and administrative decisions allow for and foster natural resource exploitation at the expense of political participation rights. Guarantees for participation, albeit enshrined in national legislation, do not automatically protect those affected. On the contrary, affected communities, civil society activists, and NGOs often have to actively advocate for being included in decision-making by government or the private sector. If communities and NGOs push to be heard and have their criticisms taken into account, violations of their civil and political rights frequently ensue.

This study backs earlier reports that have documented the high number of threats, criminal charges, and defamatory allegations against civil society actors in the natural resource arena. Uniquely, it documents the patterns in such pressures on, and restrictions of, civil society space. Others have usefully mapped the quantity of lethal attacks to expose the sheer scale of the problem (e.g., Global Witness 2014, 2015, 2016a, 2016b) or illustrated typical problems by detailing individual cases in-depth (e.g., Colectivo de Abogados José Alvear Restrepo 2017). Building on such earlier work, this report reveals how the sequence and kinds of pressures on civil society tend to follow the logic of natural resource exploitation and are often traceable to specific stages in a project. Consultations often lead to community divisions. Stigmatization and criminalization intensify when civil society challenges the beginning of resource exploration or exploitation efforts through public protests. Killings are really only the tip of the iceberg, and support for community members, their organizations, and NGOs should come long before they face physical harassment, in close relation to project design and implementation cycles.

In response to restrictions on their room for maneuver, civil society actors have developed a wide range of measures and coping strategies – both independently and in consultation with governments and international institutions – to shield and protect community-based organizations, NGOs, and their individual members against such pressures, and to reclaim space for organizing and speaking out. Although a variety of measures and support mechanisms exist, it can be difficult to assess what is most strategic in a particular situation. As one of the most prevalent forms of

defensive responses, affected community members and NGOs often opt for emergency protection measures. Yet, these measures pose a number of problems.

Security measures may, for example, end up being so time-consuming that those at risk might prefer to focus on their political work instead of meticulous adherence to security protocols. Where visibility campaigns are employed to legitimize and support affected communities and NGOs, not all individual cases can be taken up, and some are simply drowned out in the sheer number of attacks occurring worldwide. Moreover, visibility for individuals is a double-edged sword. In order not to put individuals at even more risk, it should only be used strategically and with caution. When civil society opts for withdrawal, adaptation, and self-censorship, the extent and nature of threats and harassment may be unavoidably invisibilized as a consequence. With limited time and resources, organizations have to make choices and may end up getting caught in a loop of reactive responses, leaving fewer capacities to dedicate to longer-term strategies.

Although urgent action campaigns are absolutely necessary, it is indispensable to change the characteristic dynamics of natural resource projects that result in these killings and other forms of repression. Most importantly, the link between killings or other forms of pressure and the underlying economic structures and decision-making processes involved in natural resource projects must be revealed more effectively, and response strategies designed accordingly. As long as economic policies favor the extraction of natural resources without the appropriate safeguards for civil and political rights and the participation of affected people, civil society space for engagement in natural resource governance will be under pressure. Without adequate mechanisms to strike a balance between competing visions of natural resource development, civil society will continue to face physical harassment, criminalization, stigmatization, and other pressures. 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 to have their views taken seriously.

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 readily 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 that these defenders represent. Effective consultations are one way to prove this commitment. 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. Responsibilities, however, should not only be borne by states where resource exploitation takes place. Companies' home states should comply with their extraterritorial human rights obligations and play an active role in setting the right expectations for companies headquartered in their jurisdiction, for example, in their export credit decisions. Perhaps most importantly, as recommended by the UN Working Group on Business and Human Rights, companies, not only states, will also need to «accept that [...] consultation processes might result in a change to the project»

(2017, para. 109). Otherwise, civil society's exercise of civil and political rights and participation in decision-making about natural resource exploitation is meaningless.

Furthermore, due to their presence at a natural resource projects' operation site, companies are in direct contact with communities. As companies tend to benefit from the unhindered operation of natural resource exploitation projects, they also benefit from the silencing of their critics. If business is supposed to change its approach in the long run, companies should be seen as an integral part of the different stages of natural resource exploitation and the frequently occurring restrictions of civic space along the way. Civil society has a number of tools at its disposal to gain leverage to push business to change its behavior. Civil society advocacy should include pushing for the adoption of concrete and binding norms on business responsibilities and increased efforts of foreign and domestic governments as well as international governmental organizations to monitor company conduct and sanction corporate malpractice. Finally, critical engagement is also needed with the laws that shape natural resource exploitation and civic space in natural resource decision-making. Communities and NGOs that attempt to defend against the repressive use of the law or proactively use it to enforce participatory rights, such as access to information or the right to be consulted, face a number of structural disadvantages. Improving civil society actors' chances to use legal procedures as a defensive and proactive tool to safeguard civic space is urgent: They need better access to legal knowledge, lawyers, and the financial means to engage in (long-term) judicial proceedings.

Out of the more than 60 interviews conducted with communities and NGOs in four countries and with international broker organizations and UN representatives, several concrete insights can be distilled for designing strategies to counter pressures on civic space in the natural resource arena. All of these insights aim to protect and enlarge the space of civil society actors, be it NGOs, community-based organizations, or individual activists and human rights defenders. Yet, many of the necessary changes to safeguard and expand civic space cannot be achieved by affected civil society actors alone. Collaboration is needed between all types of civil society organizations and individuals, as well as government institutions on the domestic level – including where extracting companies are headquartered – and international governmental organizations with a mandate to support and protect civic space.

How to assess and design strategies to defend and create space for civil society?

Communities, grassroots organizations, and NGOs will always combine strategies, and no single strategy will be perfect. Some reminders from the field in assessing the pros and cons of strategies include:

- Keep in mind that security measures are essential, but that they tend to be time-consuming and should be integrated in day-to-day political work.
- Recognize that strengthened local, regional, and national civil society and human rights defender networks can offer valuable, context-specific emergency support.

- Take into account that withdrawal, adaptation, and self-censorship invisibilize the magnitude of pressures in the natural resource arena and their relation to economic policies and project development.
- Consider whether visibility campaigns might expose vulnerable people to further risks, threats, or harassment and balance accordingly.
- Take into account that human rights advocacy has less leverage if a government explicitly abdicates the value of, and adherence to, human rights.
- Engage in human rights advocacy in alliance with actors that can back human rights demands with material sanctions if economic interests prevail over human rights concerns.
- Combine defensive strategies with preventative strategies.

How to avoid consultations becoming hollow exercises to legitimize resource exploitation projects?

An essential step in resource development legislation, policies, and projects is the inclusion of civil society, and in particular the affected communities, in decision-making. Increasingly though, consultations are criticized for being hollow exercises used to legitimize extractive projects without taking local concerns into account. The following recommendations provide minimum standards that civil society should insist upon in consultation proceedings:

a) Push for adequate consultation formats:
- Prior consultations include meaningful participation in elaboration of national and international standards.
- Consultations are a continuous process throughout a project's lifecycle.
- Adequate representation rests on gender sensitivity and the inclusion of all members of the consulted population, in particular women.
- Adequate consultations require access to information.
- Meaningful consultations thrive on government neutrality.

b) Enable communities to be a strong negotiating partner:
- To counter divisions, frequent community assemblies can ensure inclusion and unity.
- Independent financial resources for communities can ensure equality between negotiating partners.
- Entirely privatized consultations must be ruled out.
- Institutionalization of independent monitoring can tackle the imbalance of power in consultations.
- Financial institutions can create incentives for companies through the inclusion of respect for civic space in donor agreements and appropriate sanction mechanisms.

- Ratification of ILO Convention No. 169 and the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights can bolster accountability.

c) Push for the acceptance of community positions decided in consultations:
- Benefit-sharing is not restricted to financial compensation, but it can also involve including affected communities and their own businesses in project management and implementation.
- Community concerns should be reflected and incorporated in revised project proposals.
- Not all projects are viable: Governments and companies must accept a community's rejection of a proposed project.

How to push business to live up to its promises and (inter)national standards?

Strategies that deal with the involvement of business actors in respecting and protecting civic space are poorly developed. Business is thus often exempted from actively preventing and countering the pressures faced by project critics and NGOs. Business should be pushed to implement the – at times promising – rhetoric it has adopted and be reminded of its human rights responsibilities through new procedures and incentives as well as existing accountability mechanisms.

- Conduct research on the involvement of companies in pressures on civil society.
- Push investors and states to include company promises in contractual agreements as well as sanctions for norm violations.
- Push for the integration of human rights due diligence in the policies and lending practices of national development banks.
- File (extra-)judicial complaints against norm-violating companies.
- Push for the inclusion of safeguards against «shrinking space for civil society» in National Action Plans on Business and Human Rights.
- Advocate for binding domestic laws on human rights due diligence for companies.
- Push for civil society and human rights defender protection in a binding treaty on business and human rights.
- Push for more research into corrupt business practices, and strengthen transparency initiatives and institutions that combat corruption.

How to use legal proceedings to defend and reclaim space for civil society?

Law plays a key role in shaping natural resource governance, but it often favors corporate investments over the protection of local communities. Laws are also instrumental in restricting civic space through administrative regulations and practices of

criminalization. At the same time, though, social movements can use legal instruments strategically as leverage vis-à-vis more powerful actors. Communities and NGOs therefore need tools to counter legal pressures and develop strategies to proactively use legal procedures to reclaim their space and influence.

- Push for domestic legislation to protect human rights defenders based on existing models.
- Provide legal training for rural communities and local NGOs and educate more human rights lawyers and paralegals.
- Secure financial support for legal representation, not only to defend against allegations, but also for proactive litigation.
- Support threatened lawyers through national networks.
- Support the judiciary and prosecutors in maintaining their independence.
- Include international NGOs, foreign government representatives, EU missions, UN representatives, and embassy personnel in trial monitoring.
- Engage in judicial review to assess the constitutionality of criminal and administrative provisions that are instrumentalized to hamper civil society organizing.
- Ensure UN support for paradigmatic cases through legal interventions, for instance in the form of amicus curiae briefs.
- Consider filing charges against perpetrators of physical harassment and threats.

APPENDIX

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THE EDITORS

Heinrich Böll Foundation
Fostering democracy and upholding human rights, taking action to prevent the destruction of the global ecosystem, advancing equality between women and men, securing peace through conflict prevention in crisis zones, and defending the freedom of individuals against excessive state and economic power – these are the objectives that drive the ideas and actions of the Heinrich Böll Foundation. We maintain close ties to the German Green Party (Alliance 90/The Greens) and as a think tank for green visions and projects, we are part of an international network encompassing partner projects in approximately 60 countries. The Heinrich Böll Foundation works independently and nurtures a spirit of intellectual openness. We maintain a worldwide network with currently 32 international offices.

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European Center for Constitutional and Human Rights
The European Center for Constitutional and Human Rights (ECCHR) is an independent, non-profit legal and educational organization dedicated to protecting civil and human rights worldwide. It was founded in 2007 by a small group of renowned human rights lawyers, in order to protect and enforce the rights guaranteed by the Universal Declaration of Human Rights, as well as other declarations of human rights and national constitutions, by juridical means. ECCHR engages in innovative strategic litigation, using European, international, and national law to enforce human rights and to hold state and non-state actors accountable for egregious abuses.

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ABBREVIATIONS

ARB	Agrarian Reform Beneficiary (Philippines)
AVA	Alternative Venture Agreement
CARP	Comprehensive Agrarian Reform Program (Philippines)
EU	European Union
FCRA	Foreign Contributions Regulation Act (India)
FPIC	free, prior, and informed consent
GDP	gross domestic product
ha	hectares
HPI	Hijo Plantations Inc.
IADB	Inter-American Development Bank
IFC	International Finance Corporation
ILO	International Labour Organization
MACUA	Mining Affected Communities United in Action
MARBAI	Madaum Agrarian Reform Beneficiary (Philippines)
MMDA	Mining and Minerals Development Act (India)
MPRDA	Minerals and Petroleum Resources Development Act (South Africa)
NAP	National Action Plan (on Business and Human Rights)
NCP	National Contact Point (OECD)
NGO	non-governmental organization
NHRI	national human rights institution
NPA	New People's Army (Philippines)
OECD	Organisation for Economic Co-operation and Development
PMG	project monitoring group (India)
SDG	Sustainable Development Goal
SLAPP	strategic litigation against public participation
UN	United Nations
UNEP	United Nations Environmental Programme
UNGP	UN Guiding Principles on Business and Human Rights
WAMUA	Women Affected by Mining United in Action
WTO	World Trade Organization

DEMOCRACY
VOLUME 47

Tricky Business: Space for Civil Society in Natural Resource Struggles

Governments and national as well as corporations are driving the demand for water, land, fossil fuels, raw materials, and organic resources of all kinds, as never before. Previously intact ecosystems are being sacrificed to satisfy this hunger for resources. Thousands of people are losing their livelihoods as a consequence. But citizens, organized civil society, and affected communities worldwide are pushing back against these developments. They are fighting for their rights and working to preserve their livelihoods. However, their protests are increasingly being met with repression, harassment, and defamation.

The fact that the rights of civil society are being curtailed worldwide is, unfortunately, not a new finding, but the current scale and scope are new and dramatic. Therefore in this study the Heinrich Böll Foundation and the European Center for Constitutional and Human Rights want to show how the mechanisms of expropriation and the undermining of human rights work. For that the authors Carolijn Terwindt and Christian Schliemann traveled to India, South Africa, Mexico, and the Philippines to study projects and talk to civil society activists and organizations on the ground. The resulting analysis provides us with insights on how we can better address and monitor resource and environmental policy projects.

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