



Human Rights Defenders and Business: Searching for Common Ground

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December 2015

About the Paper

This is the fourth in a series of occasional papers by the Institute for Human Rights and Business (IHRB). Papers in this series provide independent analysis and policy recommendations concerning timely subjects on the business and human rights agenda from the perspective of IHRB staff members and research fellows. In this instance, this paper is co-published with Civil Rights Defenders and Front Line Defenders, both organisations with practical research, campaigning, and advocacy experience of the issues raised in the paper.

This Paper is published to mark the 20th anniversary of the execution of nine Ogoni activists by the Nigerian Government in 1995. The activists were opposing the activities of Shell Petroleum Development Company of Nigeria in Ogoniland in the Niger Delta. Those executions marked a watershed moment for efforts worldwide to make companies accountable for their human rights impacts.

The Paper is divided in two parts.

The first part has four essays, which detail the history of the Ogoni crisis, how it shaped the modern discourse on human rights and business, and outlines the cases in this Paper. It also shows the shrinking space for civil society worldwide. The second essay outlines the features of the Declaration for Human Rights Defenders and its implications for the state and business. The third essay shows the growing trend worldwide to crack down on civil society. The fourth essay makes the case for human rights defenders and why business should work with, rather than against, human rights defenders.

The second part has eleven cases drawn from all parts of the world, which show instances where journalists, activists, environmentalists, and trade union leaders have challenged business conduct or government policies that have undermined human rights, and the range of responses that have followed. The conclusion offers recommendations to business on how they can operate in ways that do not undermine the freedoms of human rights defenders.

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PART ONE: CHALLENGES

After Ken Saro-Wiwa: Why companies should support human rights defenders – even if they oppose them

By Salil Tripathi, Senior Adviser, Institute for Human Rights and Business¹

In November 1995, the Nigerian author, poet, and activist Ken Saro-Wiwa and eight other men² from his Ogoni community were executed in what is now widely accepted as a serious miscarriage of justice based on trumped up charges. The Ogoni Nine, as they came to be known, were campaigning against the operations of Shell, (today the world's seventh-largest oil company³ by daily production), which was then, and now, the biggest oil company operating in the Niger Delta, and was the main investor in Ogoniland. Shell was in partnership with the Nigerian National Petroleum Corporation, which had the majority stake in the joint venture, but Shell Petroleum Development Company of Nigeria (SPDC) was the operating company, and was responsible for exploration and production in the area.

The 500,000-strong Ogoni community strongly objected to pollution caused by continuous flaring in the area and the resulting environmental devastation, and raised concerns about the impacts on public health. In 1990 the community passed a charter outlining their concerns, which it described as a bill of rights. It demanded economic and social benefits from the oil operations, but the Nigerian government ignored their protests. The Movement for the Survival of the Ogoni People (MOSOP), which Saro-Wiwa led, demanded that the company and the government clean up the environment and pay a fair royalty to the region. Decades of neglect had turned the Niger Delta into "an ecological disaster and dehumanized its inhabitants," Saro-Wiwa said in 1990.⁴ "The people must not be frightened by the enormity of the task, the immorality of the present," he added. At a forum in Geneva in 1992, he described his home as a "wasteland: lands, creeks and streams are totally and continually polluted; the atmosphere has been poisoned ... by gas which has been flared 24 hours a day for 33 years."⁵

The state has the primary obligation to respect, protect, and fulfill human rights, including economic, social and cultural rights. The SPDC stated at the time that however valid, concerns of economic development should be raised with the government. The military ruled Nigeria during this period, and its government was notorious for human rights violations.⁶ There were charges of financial embezzlement against many senior

¹ www.ihrb.org

² Baribor Bera, Saturday Doobee, Nordu Eawo, Daniel Gbokoo, Barinem Kiobel, Joel Kpuinen, Paul Levura, and Felix Nuate were the co-accused with Ken Saro-Wiwa.

³ Shell is the world's third-largest private sector oil company after Exxon and BP, but seventh-largest when state-owned oil companies are included. <http://www.forbes.com/pictures/mef45gkei/not-just-the-usual-suspects/>

⁴ Saro-Wiwa, Ken: *A Month and A Day: Detention Diary*. Spectrum Books, (1995)

⁵ Saro-Wiwa, Ken: *An Address to the United Nations Working Group On In (sic) Indigenous Populations, July 1992* Office of the High Commissioner for Human Rights, (1995) Available at:

<http://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/StudyAccessToJustice/Ogoni.pdf>

⁶ Human Rights Watch: *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities* (HRW, 1999). Available at:

<https://www.hrw.org/reports/1999/nigeria/nigeria0199.pdf>

officers.⁷ In May 1994, the government of General Sani Abacha arrested the Ogoni Nine on charges of murdering four Ogoni leaders. In February 1995, a military tribunal tried them. They were denied proper access to lawyers and the trial did not follow due process of law.⁸ In October that year they were sentenced to death, and on 10 November 1995, the executions were carried out, despite appeals for clemency from many international leaders.

Some organisations in Nigeria and abroad blamed Shell for the turn of events. It should be noted, however, that the arrests of the Ogoni Nine and their trial and executions were all conducted by the Nigerian state. Many human rights organisations targeted Shell at that time, because they believed the company could have done more by using its influence to prevent the executions. Shell executives have said that appeals from world leaders were disregarded. In their view, a company alone could not do much.

The discourse on business and human rights was relatively new at that time. Campaigning organisations targeted companies by arguing that companies were ‘organs of society’, and as such, companies should advance the aspirations of the UN Universal Declaration of Human Rights as well. But international human rights law – and its obligations, in particular the obligation to respect, protect, and fulfill human rights – fell squarely on the shoulders of the state. That argument rests on the principle (and assumption) that the state is a functional entity, accountable and responsible, and able and willing to live up to its human rights obligations. Military-ruled Nigeria may or may not have been able to protect human rights; it was certainly not willing to do so. What role could a company play in such a situation?

The question Shell faced then, and which many companies caught in similar situations face today, is profound. Business has had an impact on human rights for a long time. From the time when the East India Company went to trade in India⁹ and ended up colonizing it, when mining companies went to Africa in search of natural resources¹⁰ and ended up benefiting from a colonial empire, and resource-seeking companies interfered with domestic political processes in Latin America to suit their economic interests, companies have acted in ways that have resulted in harm to human rights, whether intended or not. In the 300 years since then, there have been major changes. Companies no longer govern countries, and at least in theory, national governments can, and do pass laws, that regulate the activities of companies, both domestic and foreign. And yet, there is a widespread conviction among many sections of society that companies have the power to shape and change national policies in their interest, the impact of which could be, and often has been, adverse for human rights.

The saga of Shell in Nigeria has laid the basis for serious efforts over the past 20 years to address the interaction of business activities with human rights. Do companies have

⁷ Maier, Karl: *This House Has Fallen: Nigeria in Crisis*. Penguin, (2002)

⁸ Birnbaum, Michael: *Nigeria: Fundamental Rights Denied: Report of the Trial of Ken Saro Wiwa and Others*. Article 19, (June 1995). Available at <https://www.article19.org/data/files/pdfs/publications/nigeria-fundamental-rights-denied.pdf>

⁹ There are many accounts of the East India Company. Two useful books are: Keay, John: *The Honourable Company: The History of the East India Company*. Harper Collins, (1993), and Robins, Nick: *The Corporation that Changed the World: How the East India Company Shaped and the Modern Multinational*. Pluto, (2012). The website of the British Library offers many resources, available at <http://www.bl.uk/learning/histcitizen/trading/story/company.html>

¹⁰ Many books cover colonial-era exploitation of Africa. Two recent examples are: Pakenham, Thomas *The Scramble for Africa*. Abacus, (1992), and Hochschild, Adam *King Leopold's Ghost*. Pan (1998).

human rights responsibilities? If so, are those responsibilities, beyond the notion of respecting human rights? Do companies have enhanced responsibilities in situations where the state is unwilling or unable to perform its role and live up to its obligations? It is understood that when companies directly commit human rights abuses, they are held to account under prevailing laws. But what if a company has contributed to, or benefited from, human rights abuses? Is such a company complicit? And if so, what are the remedies, and what are the consequences? If a company does act to defend human rights, should it do so publicly? Should it disclose the nature of its interactions with governments? Does such a policy harm the human rights of the individuals who are detained? If the company prefers quiet diplomacy, and does not disclose its secret conversations with governments over human rights, how can it reassure its various stakeholders – employees, trade unions, civil society groups, and the community at large – that it has acted in their best interest? And should a company defend the rights of individuals or groups who are opposed to its presence or activities, or who advocate policies that may harm a company's business interests?

These are complex questions, and they defy easy answers. After the executions of the Ogoni Nine, human rights groups deepened their scrutiny of corporations, and began investigating their conduct and publishing reports of corporate conduct that harmed human rights. The extractive and apparel sectors were the first to be so targeted, but over time, more sectors have faced scrutiny – such as pharmaceuticals and information and communications technology – as well as business practices – such as taxation, corruption, land acquisition, and consultation and consent of communities – which often placed companies and human rights advocates in adversarial positions.

To address gaps in governance, many industries came forward with their own initiatives or participated in initiatives developed with civil society groups and governments, to deal with human rights challenges. The extractive industry developed the Voluntary Principles for Security and Human Rights,¹¹ the diamond industry agreed on the Kimberley Process Certification Scheme¹² to remove conflict diamonds from the flow of international trade, social accountability¹³ and labour standards set out rules to protect workers' rights, and so on. The UN Global Compact was launched in 2000¹⁴ to establish the basic minimum standard companies should adhere to, with regard to human rights. And in 2005, then UN Secretary General Kofi Annan appointed John Ruggie¹⁵ as his special representative to identify and clarify human rights standards as they apply to businesses. Ruggie's mandate was renewed in 2008, and the Guiding Principles he prepared were adopted unanimously by the Human Rights Council in 2011.¹⁶

¹¹ Voluntary Principles for Security and Human Rights were unveiled in 2000 to ensure that while protecting people and assets of extractive companies, security forces should not harm human rights. The initiative includes nine governments, 28 companies, and ten non-government organisations. Available at www.voluntaryprinciples.org.

¹² Kimberley Process Certification Scheme was established in 2000 to break the link between diamond trade and armed conflict. Today it includes 54 participants, six candidate countries, and four observers. www.kimberleyprocess.com

¹³ Details about Social Accountability International can be found at <http://www.sai-intl.org/index.cfm?fuseaction=Page.ViewPage&PageID=937>

¹⁴ The UN Global Compact was created after a speech by then Secretary General Kofi Annan at the World Economic Forum in 1999. It has ten non-binding principles covering human rights, labour rights, environment, and corruption. Today, it includes thousands of companies and other organisations. Details available at www.unglobalcompact.org

¹⁵ Details about the SRSG mandate can be found here: <http://www.ohchr.org/EN/Issues/Business/Pages/SRSGTransCorpIndex.aspx>

¹⁶ The Guiding Principles can be found here: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

The UN Guiding Principles on Business and Human Rights provide a clear framework for companies by outlining the corporate responsibility to respect human rights and by expecting companies to conduct human rights due diligence. The Guiding Principles represent a significant step forward. But they presuppose a functioning state, which has the obligation to respect, protect, and fulfill rights. They also presuppose willingness on the side of companies to follow them.

In the two decades since the execution of the Ogoni Nine, the situation for human rights defenders has not improved significantly. A recent Human Rights Watch report shows how human rights defenders who challenge the policies and practices of the World Bank face significant risks.¹⁷ The long-standing work¹⁸ of the International Service for Human Rights shows that the trend of attacks on human rights defenders challenging business continues unabated. The database¹⁹ at the Business and Human Rights Resource Centre shows many examples of human rights defenders' rights being denied.

To be sure, 2015 is not 1995, and sustained campaigning by human rights organisations and enlightened leadership from corporations as well as government leadership have all contributed to a more nuanced environment today. Many companies have changed their policies as a direct consequence of campaigns and greater awareness. Many standards – voluntary in some cases, restating international standards in other cases, have reminded governments and companies of their responsibilities. This has led to a change in corporate behaviour. And yet, significant gaps remain. Companies continue to operate in places where rules are unclear and governments are sometimes unwilling to protect rights. Some companies continue to act in ways that place their own interests first even if it is to the detriment of human rights.

Of greater concern is the government crackdown in several countries in recent years against civil society. Many countries have passed laws or changed rules that affect tens of thousands of civil society organisations. By one count, more than 60 countries have passed or amended laws that curb non-governmental organizational activities, including criminalizing their activities in some instances. The Carnegie Endowment²⁰ calls the trend a "viral-like spread of new laws" under which international aid groups and their partners are criticized, harassed, closed down, sometimes expelled, and in some cases criminal charges are filed against them. Amnesty International considers this attack "unprecedented."²¹ Some governments have resorted to actions including harassment, surveillance, intimidation, criminalization, and procedural and bureaucratic burdens, leading up to prosecution.

¹⁷ Human Rights Watch: *At Your Own Risk: Reprisals against Critics of World Bank Group Projects*. Human Rights Watch, (2015). Available at: <https://www.hrw.org/report/2015/06/22/your-own-risk/reprisals-against-critics-world-bank-group-projects>. Also listen to IHRB's conversation with Jessica Evans of Human Rights Watch: <http://www.ihrb.org/media-centre/voices/jessica-evans.html>

¹⁸ Reports and documentation of the International Service for Human Rights can be found at <http://www.ishr.ch/news/supporting-human-rights-defenders>

¹⁹ Information compiled by the Business and Human Rights Resource Centre can be found at: <http://business-humanrights.org/en/human-rights-defenders>

²⁰ Carothers, Thomas, and Brechenmacher, Saskia *Closing Space: Democracy and Human Rights Support Under Fire*. Carnegie Endowment for International Peace, (2014). Available at: http://carnegieendowment.org/files/closing_space.pdf

²¹ Sherwood, Harriet: *Human rights groups face global crackdown 'not seen in a generation'* The Guardian (26 August 2015). Available at: <http://www.theguardian.com/law/2015/aug/26/ngos-face-restrictions-laws-human-rights-generation>

In this Paper, 11 individual cases from all parts of the world are discussed. Each highlights how business conduct or silence has contributed to creating an adverse impact on human rights. In most of the cases, the direct responsibility for the human rights violations described rests with the state. The human rights defenders involved have either challenged the state and its policies, which are seen to benefit companies, or have targeted companies themselves over their practices. The human rights defenders profiled in the Paper have sought to exercise their rights peacefully. They include journalists, community activists, trade unionists, and environmental advocates.

The cases are:

- **In Angola**, a journalist who exposed wrongdoing in state-linked companies has been sued for defamation;
- **In Azerbaijan**, a journalist who has alleged corruption has been sentenced to a long prison term;
- **In Bangladesh**, a trade union activist has been murdered;
- **In China**, a health rights activist challenged censorship by the government over contaminated milk supplies and was sentenced to a thirty-month prison term for disturbing public order;
- **In Cuba**, a trade union activist trying to establish an independent union is being prosecuted;
- **In India**, a human rights defender challenging a proposed steel plant has been arrested and harassed;
- **In Kenya**, a community activist defending his property rights has been assaulted;
- **In Morocco**, the Internet network of an activist group has been compromised because of surveillance software;
- **In Myanmar**, human rights defenders fighting for community rights against a copper mine have been jailed;
- **In Peru**, a journalist investigating a project has been followed and allegedly assaulted; and,
- **In the Russian Federation**, an environmental activist opposing the Olympic Games has been detained.

In some cases, companies are either targets of activists or are allied with the state or state-owned companies, whose activities the activists oppose. When the state has launched proceedings against the activists, or intimidated them, the companies discussed in these cases appear to have remained silent. In one case, a company provided tools that enabled the state to violate human rights; in other cases, companies have benefited from the actions that the state has taken, even if the company had not explicitly intended for such actions to occur. In other instances, the companies involved are not fully aware of the human rights impact of their activities, and if they are, they seem to have decided that the risk is outweighed by the benefits.

Companies are not legally required to speak out against human rights abuses, to intervene – in public or quietly – on behalf of human rights defenders, to ally with a community or civil society in specific human rights cases. Nor is there a requirement that they must stop doing business in a country where human rights abuses are widespread, unless there are sanctions imposed on the country. In many instances sanctions have been circumvented, and it should also be noted that human rights abuses are not the sole reason why sanctions are imposed on a country. However, the

UN Declaration on Human Rights Defenders,²² which was adopted by consensus by the UN General Assembly, makes clear the responsibility on states to protect human rights defenders.

It is not surprising that companies see many human rights defenders as adversaries, because many human rights defenders challenge corporate actions or policies that benefit corporations. But more reflection and deeper analysis would suggest that in the ultimate analysis, companies and human rights defenders share several crucial objectives. Companies that operate without community consent run the risk of their projects being blocked or stopped. Companies that acquiesce with governments that detain human rights defenders arbitrarily expose themselves to the risk of similar treatment from the government if their interests collide. It is time to build on what unites the two, so that respect for human rights becomes a living reality.

²² UN General Assembly A/RES/53/144 *The Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*. (1999). Full text is available <http://daccess-ods.un.org/TMP/5537777.54306793.html>. More information is available here: <http://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Declaration.aspx>

The UN Declaration on Human Rights Defenders:

A clear normative framework, a harsh reality

By Andrea Rocca, Head of Protection, Front Line Defenders²³

Human rights defenders are people who work peacefully on behalf of others to promote and defend internationally recognised human rights. They are defined by their actions rather than by their profession, job title or organisation, and they can work individually or collectively, as part of a group.

This broad definition is derived from the UN Declaration on Human Rights Defenders (thereafter "the Declaration").²⁴ The Declaration was adopted by consensus by the UN General Assembly on 9 December 1998, symbolically on the day before the 50th anniversary of the Universal Declaration of Human Rights (UDHR). It reaffirms that all governments have a duty to protect, promote and implement all human rights and fundamental freedoms, and states in its Article 1 that "Everyone has the right, individually and in association with others, to promote and to strive for the protection and realisation of human rights and fundamental freedoms at the national and international levels."

The Declaration was a historic achievement. It was the first explicit recognition that people have a *right* to engage in the human rights discourse and work towards defending their rights. The need to make this right explicit came from the acknowledgement of a troubling reality, namely the fact that human rights defenders often face very concrete and significant risks on account of their work. Reaching an agreement on a text every government could agree with was not an easy task though. A working group was established by the then UN Commission on Human Rights in 1985 and it took 13 years of negotiations to reach consensus.

A number of challenges slowed the process significantly. First of all, there was a clear division between states genuinely interested in having a robust text that strengthened the protection of human rights defenders, and those who aimed for a weaker text that highlighted the duties and obligations of these individuals. This division was evident throughout the drafting process but was particularly clear in relation to a small number of contentious issues, including the role of domestic law. On this particular issue, the compromise was an acknowledgement that domestic law provides the legal framework for the work of human rights defenders, but that it must be in line with the international human rights obligations of the state. Other contentious issues included the recognition that human rights defenders have a right to seek funding for their human rights work; the right to observe trials; and the right to freely choose the human

²³ Founded in Dublin in 2001, Front Line Defenders is the International Foundation for the Protection of Human Rights Defenders. It works to provide fast and effective action to help protect human rights defenders at risk so they can continue their work as key agents of social change. More details at <https://www.frontlinedefenders.org/>

²⁴ Declaration A/RES/53/144 (ibid.)
<http://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Declaration.aspx>

rights issues to work on. These were all affirmed in the final text. As regards proposed provisions stressing duties and responsibilities of human rights defenders, these were eventually reduced to a statement in the Declaration, which affirms that, “Everyone²⁵ has duties towards and within the community.”

While the Declaration is not binding, the rights it includes are protected under the UDHR and the core international human rights treaties, such as the right to freedom of expression, association and assembly. The Declaration is innovative in that it spells out specific aspects of those rights relevant for the work of human rights defenders. This includes, for example, the right to communicate with non-governmental and inter-governmental organisations (Article 5(c)); the right to draw public attention to human rights issues (Article 6(c) and 8(2)); and the right to develop and discuss new human rights ideas (Article 7). Equally significant is the clarification that human rights defenders can act “individually or in association with others”, which recognises the legitimacy of human rights defenders working individually, without affiliations to human rights groups, as well as of groups which are not formally registered as legal entities. That is an important distinction because in many states the process of registering a human rights organisation is arduous. Finally, a key message of the Declaration is that the state has a duty to protect human rights defenders, both from the actions of state agents as well as the acts of private groups or individuals, which includes companies. The state must also ensure that individual defenders do not suffer adverse consequences because of their legitimate work on behalf of others.

The Declaration has provided a solid normative framework and has been strengthened and complemented over time by a number of initiatives and mechanisms, both within the UN system and within regional human rights organisations.²⁶ The most recent initiative are the Guidelines on the Protection of Human Rights Defenders, published in June 2014 by the Organisation for Security and Cooperation in Europe (OSCE), which detail member states' obligations under their OSCE commitments.

Yet, sadly, the situation today is as far from the spirit of the Declaration as ever, and all these initiatives have failed to stop the targeting of human rights defenders by those with power – states as well as non-state actors. Governments that are authoritarian as well as those that are outwardly democratic across the world continue to invest huge efforts and resources to close down, silence, restrict and discredit independent civil society and human rights defenders. There is a sustained effort to target them in the countries where they operate, through spurious legal proceedings and extra-legal means, as well as internationally, through travel restrictions, reprisals and attacks on civil society space in international fora. The number of human rights defenders targeted in relation to their work on economic, social and cultural rights, including land and indigenous peoples' rights, is increasing.

Over 130 human rights defenders in 21 countries were killed in the first ten months of

²⁵ Declaration, *op. cit.*

²⁶ A Special Representative of the UN Secretary-General on the situation of human rights defenders (later changed into a Special Rapporteur) was established in 2000. In 2001, the Inter-American Commission on Human Rights created a Human Rights Defenders Unit, and established the mandate of the Special Rapporteur on human rights defenders in 2011. A similar mandate was established in 2004 by the African Commission on Human and Peoples' Rights. Also in 2004, the European Union adopted EU Guidelines on Human Rights Defenders. In 2014, the Organisation for Security and Cooperation in Europe adopted Guidelines on the Protection of Human Rights Defenders.

2014.²⁷ Global Witness reports that over 900 people were killed between 2002 and 2013 for defending the right to land and the environment, often in opposition to companies. CIVICUS documented substantial threats to freedom of expression, association and assembly, targeting to a great extent human rights defenders, in 94 countries in 2014. The International Center for Not-for-Profit Law (ICNL) reported that from January 2012 to June 2014, more than 50 countries have adopted measures limiting space for civil society; this includes laws restricting NGOs' ability to operate, as well as laws on a range of issues, such as freedom of assembly, terrorism, the Internet, police powers, or LGBTI activism, which have been used against human rights defenders or social movements.

This Paper presents examples of human rights defenders who have been targeted because of their work around the actual or perceived impact of business on the enjoyment of human rights. Similar cases have been documented across all world regions, and in relation to different types of companies and business sectors. They include instances of surveillance, intimidation, threats, judicial harassment and physical assaults. The state, which often appears to favour business interests over legitimate human rights concerns, is implicated in virtually all examples. Sometimes, companies appear to be directly implicated in the violations, and in all cases they appear to benefit from the actions of the state. It is encouraging to see, as in the case from Angola, that some companies have taken a stand in support of human rights defenders. What is common to all the cases in this Paper, however, is that human rights defenders have suffered and have been victimised for trying to protect the rights of others.

The challenge facing us, and anyone who understands the essential role that human rights defenders play in society - including governments and supportive companies - is twofold: first, to find effective strategies to counter the current backlash against human rights defenders, and ensure that they can operate safely; second, to find ways to engage businesses and convince them of the need and the benefits of ensuring that human rights defenders can safely raise issues related to adverse human rights impacts of business activities, without being targeted as a result.

The adoption of National Action Plans on business and human rights is a good opportunity for civil society and governments to engage with companies on this issue and ensure the inclusion of specific measures concerning their protection. As argued elsewhere in this Paper, even when human rights defenders and companies are on opposite sides of a dispute, the work of human rights defenders ultimately benefits businesses because it contributes to democracy, the rule of law, the eradication of corruption, effective accountability, and stability in the country.

²⁷ Front Line Defenders *Human Rights Defenders in the Balance: Annual Report 2015*. Front Line Defenders, (2015). Available at <https://www.frontlinedefenders.org/2015-Annual-Report>

Growing Restrictions on the Operations of Civil Society: The Role of Business Enterprises

By Brittany Benowitz, Chief Counsel, and Monika Mehta, Staff Attorney for South and Southeast Asia, ABA Center for Human Rights²⁸

As the cases in this Paper illustrate, business enterprises have tremendous power to influence the rule of law around the world for better and for worse. Companies can contribute to human rights abuses by government actors in a number of different ways. They sometimes instigate, solicit, support or tacitly approve violations committed by government actors where it may be seen as being in the narrow corporate interest to do so. Other times, business actors may hinder efforts to develop strong and independent institutions capable of enforcing the rule of law if such institutions are perceived as undermining business interests. In either case, however, and despite potential short-term benefits, the effect of such actions is the same: the long-term security of investments is compromised by lack of faith in the legitimacy of government institutions, including the justice system, and may result in cycles of violence and other forms of conflict.

In Guatemala, decades of disputes about land ownership and labor issues resulted in an internal armed conflict that lasted for three decades and resulted in the deaths of 200,000 people, mostly indigenous civilians. In 2012, the ABA Center for Human Rights sent a team of lawyers to Guatemala to investigate so-called “social conflicts” over large-scale agricultural, mining and hydroelectric projects. When we asked about the drivers of the conflicts in Guatemala today, everyone pointed to issues left over from the war that were supposed to have been resolved by the 1996 Peace Accords, including the failure to implement land reform mandated by the Accords.

When asked about the ability of the courts to resolve these disputes, few expressed much confidence. We found cases against security guards who violently threatened protestors, resulting in token punishments for the guards²⁹, while preliminary

²⁸ This article was prepared on behalf of the American Bar Association, Center for Human Rights by Brittany Benowitz, Chief Counsel and Monika Mehta, Staff Attorney. The statements and analysis contained in this article are the work of the ABA Center for Human Rights, which is solely responsible for its content. The Board of Governors and House of Delegates of the American Bar Association has neither reviewed nor sanctioned its contents. Accordingly, the views expressed herein should not be construed as representing the policy of the ABA. In addition, this article is intended as background information. It is not intended as legal advice on particular cases.

The ABA Center for Human Rights is the American Bar Association’s focal-point entity on international human rights concerns. The Center’s Business and Human Rights Project works to help implement the UN Protect, Respect, Remedy Framework and Guiding Principles on Business and Human Rights and relevant international law. The Center’s Justice Defenders Program provides legal assistance to human rights defenders who face retaliation for their work. For more information please contact us at: Justicedefenders@americanbar.org and follow us on Twitter @JusticeDefend

²⁹ The Guatemala Human Rights Commission, “The Peaceful Environmental Justice Movement at ‘La Puya’: Violence, Repression, and Resistance at the El Tambor Gold Mine in Guatemala (November 2014). Available at <http://www.ghrc-usa.org/wp-content/uploads/2014/11/Puya-report-final.pdf>.

investigations into the shootings of community leaders stalled.³⁰ Transnational corporations continued their operations in open disregard of orders from ministries and courts calling for compliance with local laws.³¹ Attempts to address environmental concerns through international bodies established by free trade agreements produced no meaningful results.³² Efforts to hold corporations accountable in their home countries were barred by local laws that pushed responsibility back on developing nations with weak institutions.³³ Labor leaders were killed with impunity.³⁴ In short, in the last few years, the Guatemalan government has failed to provide meaningful redress for grievances and, as a result, the cycle of violence has continued.

The story is the same around the world. In Cambodia, a judge takes it upon himself to present new evidence on the last day of the trial against union leaders accused of inciting protests to raise the minimum wage.³⁵ Meanwhile, a factory owner who subjects his workers to deadly conditions will not stand trial.³⁶ In Angola, as this Paper shows³⁷, a journalist documenting extrajudicial killings in diamond mines is convicted of defaming the former generals who run the mines.³⁸ In instances where human rights lawyers have observed such trials, sentences may be reduced or commuted, but the threat of jail continues to hang over the head of every activist. If an activist lives in Venezuela, Ethiopia, Russia, or India, she should not even think of seeking or accepting donations or grants from a foreign government or foundation if she wants to continue operating. In a significant number of other countries, the situation is equally concerning.

Yet, there may be some hope. The President of Guatemala recently resigned³⁹ and is facing charges in the wake of a corruption investigation that prompted tens of thousands of citizens to take to the streets. In Cambodia, major clothing producers are calling for greater recognition of collective bargaining rights to level the playing field of international commerce in response to constant pressure from labor rights groups

³⁰ The ABA Center for Human Rights, the RFK Center for Human Rights and the Human Rights Institute at Georgetown Law, "Tilted Scales: Social Conflict and Criminal Justice in Guatemala," Available at http://www.americanbar.org/content/dam/aba/administrative/human_rights/jd_tilted_scales_eng.authcheckdam.pdf

³¹ The Guatemala Human Rights Commission

³² This is based on research prepared by pro bono counsel for the ABA Center for Human Rights and is a reference to actions under Chapter 17 of CAFTA.

³³ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013).

³⁴ Public Submission to the Office of Trade and Labor Affairs Under Chapters 16 and 20 of the Dominican Republic – Central America Free Trade Agreement, *available at* <https://www.dol.gov/ilab/reports/pdf/GuatemalaSub.pdf>

³⁵ International Senior Lawyers Project, "International Senior Lawyers Project Finds Serious Violations of Fair Trial Rights in Connection with the January 2014 Cambodian Garment Worker Protests," http://www.islp.org/sites/default/files/ISLP%20Finds%20Serious%20Violations%20of%20Fair%20Trial%20Rights%20for%20Cambodian%20Garment%20Workers_0.pdf (last visited October 27, 2015).

³⁶ Human Rights Watch, "Work Faster or Get Out: Labor Rights Abuses in Cambodia's Garment Industry" (March 2015), http://features.hrw.org/features/HRW_2015_reports/Cambodia_Garment_Workers/index.html.

³⁷ ABA Center for Human Rights, "Trial Observation Report: The Case of Rafael Marques de Morais" (June 2015), *available at* http://www.americanbar.org/content/dam/aba/administrative/human_rights/trialobservationreport_rafael_marques.authcheckdam.pdf.

³⁸ Human Rights Watch, "Angola: Rights Activist Face Outrageous Trials" (June 17, 2015), <https://www.hrw.org/news/2015/06/18/angola-rights-activists-face-outrageous-trials>.

³⁹ Ahmed, Azam, and Malkin, *Elizabeth Otto Pérez Molina of Guatemala Is Jailed Hours After Resigning Presidency*. The New York Times, (3 September 2015). Available at: http://www.nytimes.com/2015/09/04/world/americas/otto-perez-molina-guatemalan-president-resigns-amid-scandal.html?_r=0

and consumers. The African Court of Human and Peoples' Rights recently ruled that jail time is an excessive penalty for the crime of defamation.⁴⁰

To produce lasting change, however, businesses and civil society leaders alike must agree that strong government institutions are needed to resolve disputes. Companies seeking a level playing field must support efforts by local governments to protect those protesting environmental degradation and advocating for the rights of workers. Those seeking a fair hearing in court must abide by judgments against them, refrain from pressing frivolous charges against human rights defenders, support the independence of the judiciary and advocate for laws creating extraterritorial jurisdiction in functional court systems. It is only through such a principled and consistent support of strong government institutions that corporations can ensure the security of their investments and respect for fundamental human rights long term.

⁴⁰ *Lohe Isse Konate v. Burkina Faso*, Application No. 004/2013 African Court of Human and People's Rights, <http://www.african-court.org/en/images/documents/Judgment/Konate%20Judgment%20EngL.pdf>

The Role of Human Rights Defenders:

What should responsible governments and companies do?

By Erik Jennische, Programme Director, Civil Rights Defenders⁴¹

Regardless of whether it is a company or a government that plans to engage in favour of human rights, they must always put human rights defenders at the centre. These individuals are the advocates for victims of abuses and give meaning to the realisation of human rights.

Human rights are not realised merely because they are enshrined in an international declaration, a national constitution, or in domestic legislation. They are realised when citizens are able to demand that their rights be respected. Human rights defenders are the vanguard in this work. This is true irrespective of the form of government – whether in functioning democracies or in countries ruled by governments that pay scant attention to human rights.

This may seem like a given, but is far from uncontroversial. In fact, all too often both companies and governments undermine the role of human rights defenders, by excluding them from consultations and only talking directly to each other. Multinational companies operating in countries beyond their borders may do so due to fear of interfering in local politics, because they do not want to understand the local context or analysis of the situation, or because they are not willing to consider or accept the often costly demands that human rights defenders make.

However, if foreign firms do not communicate with or consult human rights defenders when conducting due diligence or analysing the problems they face, and if they do not involve them in efforts to find solutions, their operations will not be successful. In such cases, their interaction with local communities will likely end up with symbolic initiatives and changes that do not deal with real concerns and problems.

Later on in this Paper, in the Azerbaijan case, Telia Sonera says that it does not take position on individual cases when asked specifically about the company's view on Khadija Ismayilova, a prominent journalist who has investigated political corruption in Azerbaijan, and who was sentenced to seven-and-a-half years in prison earlier this year. Even if Telia Sonera has no legal obligation to speak out in cases involving human rights defenders, by avoiding taking a public position on her case, the company runs the risk of conducting inadequate due diligence.

And, as the case of Evgeny Vitishko shows, if the International Olympic Committee, IOC, had consulted human rights defenders, environmental activists, and local community

⁴¹ Civil Rights Defenders is an independent expert organisation founded in Stockholm in 1982 with the aim of defending human rights, in particular people's civil and political rights, while also supporting and empowering human rights defenders at risk. <http://www.civilrightsdefenders.org/>

groups when planning the Olympic Games in Sochi, its understanding of the environmental impact of the Games would have been better informed during its negotiations with local authorities, and the IOC would have been better prepared to deal with the issue, including the criticism that followed later.

Another example can be seen in the work of Civil Rights Defenders and several Cuban human rights organisations, which have been monitoring the European Union's (EU) ongoing negotiations with the Cuban government on the *Political Dialogue and Cooperation Agreement*. The purpose, according to the EU, is to build a framework for future dialogue on human rights, among other issues. But the substance of the agreement, or how it should be implemented, has not been made public. Some Cuban and European human rights defenders have been invited to informal meetings to discuss the negotiations, but they have not been provided with critical information on what subjects will be included in the agreement. One reason, apparently, is that the Cuban government would not accept that human rights defenders should be given the opportunity to influence the negotiations, a position the EU should not accept. It is unacceptable that the EU and Cuba may sign an agreement without giving their citizens the opportunity to discuss it.

The problem for companies interested in investing in Cuba is similar. The Cuban law on international investments clearly states that investors cannot employ their own staff, except in the central management team. The rest of the staff should be provided by the Cuban state employment agency. If there are conflicts between management and labour in the workplace, the company cannot handle it on its own or in consultation with workers. According to the law, the conflict will be resolved by the agency.

This has several human rights implications. Cuban workers lack the right to form independent trade unions, which means they cannot organize themselves locally at the level of the company. Companies that care for employee rights and which see the positive aspects of employees organizing themselves, have no local counterpart to interact with, when trying to resolve conflicts, or deal with problems. Their point of contact is the Cuban government. Nor can employees negotiate collectively with the company they work for. Independent human rights organisations or independent trade unions cannot play a meaningful role to represent citizens' and workers' rights in such a situation. The rights-holders are defenceless and unrepresented.

All of these cases illustrate the same problem: when foreign governments and companies exclude consultation with human rights defenders when analysing the context in which they operate, their capacity to conduct due diligence, and to mitigate problems is reduced. Human rights violations, labour conflicts, and environmental problems become more likely.

In order to put human rights defenders at the centre of the work, governments and companies need to act on two levels, regardless of the country: they should apply pressure from within and from the outside.

From within means that governments and companies should formalise a dialogue with local human rights defenders and use their information and analysis of current problems. This dialogue grants legitimacy to human rights defenders, which strengthens their position and impact, and eventually makes the government listen and take concerns seriously. Equally important, pressure *from the outside* means the foreign

state or the foreign company takes on the demands of local human rights defenders as their own, and raises those in their negotiations with the local government.

If local human rights defenders' central demand is that the country in question ratifies international human rights covenants, for example, a responsible government will add that demand to its own in negotiations with the counterpart government. Similarly, a responsible company planning to invest in a country where workers are not allowed to organise themselves in trade unions should make freedom of association for its employees a requirement for making the investment. Where that is not feasible, it should consider ways of supporting freedom of association even if the right is not recognised or effectively enforced.

It is in the interests of any responsible state or company wherever they operate to seek legitimacy for local human rights defenders so that they can undertake their activities without intimidation. A rights-based society that is governed by law is good for human rights defenders and for business.

PART TWO: DEFENDERS

DAYAMANI BARLA

By Usha Ramanathan

The development project pursued by the Indian state has produced pitched conflict between local communities and project authorities in many parts of the country. These projects have inevitably accompanied mass displacement and destabilized affected communities. State interest has begun to be identified with corporate interests, with affected communities fearing, and experiencing, exclusion, neglect, broken promises, and repression, and when they oppose a project, they have faced charges of sedition and are described as being anti-national.

Tribal communities, who are granted special dispensation with regard to land under India's constitution, find themselves arrayed against the forces of the state. Their protests and resistance are criminalized, and individuals have emerged as icons epitomizing a worldview that provides a sharp contrast to the corporatising vision currently dominant in India.

Dayamani Barla is such an icon. She has led a valiant struggle against ArcelorMittal, the world's largest steel company, to protect land belonging to adivasis, as Indian laws describe tribal communities. Dayamani's oldest memories are of her parents being cheated of their land. Her family had no home to call their own, and her parents travelled far to work as servants. Dayamani too worked as domestic help but she studied and got a masters degree in commerce. In 1995, while still a student, she joined the movement against the Koel Karo dam in her home state of Jharkhand in eastern India. The dam would have displaced a quarter of a million people and inundated 55,000 hectares of agricultural land and 27,000 hectares of forestland. This was adivasi territory, and she challenged the project. For adivasis, the forest and land are not property but heritage, she said in an interview. "Our language and history are linked to them. Our culture is associated with that."

Dayamani then took to journalism to give voice to the adivasi experience. India was undergoing a major transformation – the country had embarked on economic reforms, and vast sectors of the economy, from which the private sector had previously been prohibited, were now opened up for investment, both domestic and foreign. In 2005, the government began signing Memoranda of Understanding (MOUs) with the private sector, which would assure companies that the state would act as a facilitator to obtain land for their project, help companies get environmental clearances, and permit diversion of forest areas (which are protected from development) for non-forest purposes (which would permit industrialisation).

This relationship between the corporation and the state meant the erosion of the responsibility of the state to adivasis and other local communities who would be displaced by the project. It became easier for companies to acquire land, minerals and forests. It would also disrupt communities. Past records of such development projects in India have showed spiraling impoverishment. Large tracts of land being taken over for

projects were in what is constitutionally recognised as Scheduled Areas,⁴² where land cannot be transferred from tribal to non-tribal ownership. According to the Panchayats (Extension to Scheduled Areas) Act of 1996, state plans cannot override the decisions made by tribal communities, but those safeguards were being ignored when the MOUs were signed. Of the 104 MOUs that the Jharkhand government has signed with small and big companies in recent years, nearly 98% violate the provisions of the Constitution's Fifth Schedule, according to Dayamani. Almost all projects are developed under public private partnerships and the state says they are all meant to serve the public interest.

In 2005, the Jharkhand state government entered into an MOU with ArcelorMittal, which proposed investing \$8.79 billion to set up a steel plant that would produce 12 million tons of steel annually, along with a power plant which would produce electricity for the steel plant on a plot of 12,000 hectares of land in Gumla in Jharkhand state. The project, Dayamani said, would have displaced many people and destroyed large forest areas, endangering local lives.

Dayamani fought a spirited battle through her organisation, Adivasi Moolvaasi Astitva Raksha Manch (Forum for the Protection of Tribal and Indigenous Peoples' Identity) – she was arrested frequently and jailed – and finally in 2010, the government relented and said the MOU would not extend to Gumla.

In October 2012, while leading protesters who were agitating against the take over, she was arrested and put away in jail for 69 days. Dayamani alleges that during her agitation against the company, she used to get threats everyday. She would get phone calls where, she says, "they said they would pump bullets into my body or blow me up into pieces. When they realised I wouldn't budge, they threatened to abduct me in full public view. I laughed. I told them it was not possible for me to stop. I haven't."⁴³ It is not known who made those calls.

A high-level committee that the Indian Government set up has noted her struggle and expressed concern over criminalisation of dissent in its report⁴⁴ in 2014: "Leadership emerging from tribal communities and public defenders working for the tribal interest also have cases registered against them.... Since 2006, when she spearheaded a protest against ArcelorMittal's proposed steel plant on 11,000 acres of land in Gumla and Khunti where the Chotanagpur Tenancy Act prohibits the sale of tribal land to non-tribals, she has been charged in connection with other protests in the region..."

ArcelorMittal executives have said they would not try to grab any land by force, and wish to enter into a dialogue with the communities to understand their grievances. But Dayamani remains firm. In an interview with the British Broadcasting Corporation in 2008, she said: "The corporate houses are simply ignorant of the concept of the

⁴² The fifth Schedule of the Constitution of India consists of provisions regarding administration and control of Scheduled Areas and Scheduled Tribes. Details can be found here: [http://lawmin.nic.in/olwing/coi/coi-english/Const.Pock%202Pg.Rom8Fsss\(33\).pdf](http://lawmin.nic.in/olwing/coi/coi-english/Const.Pock%202Pg.Rom8Fsss(33).pdf)

⁴³ Barla, Dayamani: *A Tribal's Tale of Struggle and Why she Can't Stop* Catch News (11 August 2015). Available at <http://www.catchnews.com/india-news/for-life-dignity-a-tribal-s-tale-of-struggle-and-why-she-can-t-stop-1439268259.html>

⁴⁴ Ministry of Tribal Affairs, Government of India *Report of the High Level Committee on Socio-Economic, Health and Educational Status of Tribal Communities in India*. Government of India, (May 2014, pp 358-9). Usha Ramanathan, who has written this case, was a member of that Commission. The report is available at: <http://www.kractivist.org/wp-content/uploads/2014/12/Tribal-Committee-Report-May-June-2014.pdf>

subsistence economy of a tribal society that is rooted in agriculture and forest produce. To us the natural resources are not merely a means of livelihood, but our identity, dignity, autonomy and culture have been built on them for generations. These communities will not survive if they are alienated from the natural resources. How is it possible to rehabilitate or compensate us?"⁴⁵ In 2013, Cultural Survival chose Dayamani Barla for the Ellen L. Lutz Indigenous Rights Award.⁴⁶

⁴⁵ Basu, Moushumi: *Indian Woman with a Steely Resolve*. BBC (21 October 2008)
http://news.bbc.co.uk/1/hi/world/south_asia/7610127.stm

⁴⁶ <https://www.culturalsurvival.org/news/indias-dayamani-barla-selected-cultural-survivals-ellen-l-lutz-indigenous-rights-award>

IVAN HERNÁNDEZ CARRILLO

By Erik Jennische

The Confederation of Independent Workers of Cuba is a unique organisation. Cuba does not permit independent workers' organisations, but the Confederation has existed since 2008 and organises more than 500 workers in small businesses, the health and education sectors as well as in the fishing and mining industries. It has managed to survive in a difficult environment, where other officials take over work when its leaders are arrested. The Confederation has had to struggle to survive in Cuba, given the government's opposition to such independent groups. The Confederation's Secretary General, Iván Hernández Carrillo, was arrested in March 2003, together with 74 other activists, on a general crackdown on human rights defenders and democracy activists. He was accused of working for foreign interests and threatening national sovereignty. He was later sentenced to 25 years in prison. He was let out of prison in 2011, but only to serve the rest of his sentence at home.

In August and September 2013 he was attacked and severely beaten by police on several occasions. He is now serving his sentence at home and continues to work for the union. He is not allowed to travel overseas, and can be taken back to the prison any time. The Inter-American Commission on Human Rights⁴⁷ (IACHR) adopted a precautionary measure stating that his life and physical integrity was at stake, that he was defenceless, and that he faced real risks. The Cuban government did not abide by the requests of the IACHR, which included protection measures to ensure his physical safety.

The United States (US) and Cuba have normalised their relations with the opening of embassies in both countries. The US government still has in place several laws restricting economic relations with Cuba, including trade and investment, but many investors from Europe and the rest of the world are visiting Cuba to look for opportunities to invest. The new diplomatic relations with the US and the bilateral agreement with the European Union being negotiated at the moment will facilitate investments further.

In recent years the Cuban government has increased its efforts to attract foreign investors, especially in the food, agricultural, mining and tourism sectors as well as in the "Special Development Zone" of the port city of Mariel. In order to facilitate the investments, the national assembly adopted a new labour code (2013),⁴⁸ a new law on foreign investments (2014) that regulates working conditions for employees in companies with foreign owners, and a catalogue with "opportunities" for investors (2014).⁴⁹

⁴⁷ Inter-American Commission on Human Rights Resolution 5/2013 *Matter of Iván Hernández Carrillo regarding Cuba PRECAUTIONARY MEASURE No. 245-13* Available at: [http://www.oas.org/en/iachr/decisions/pdf/Resolution5-13\(MC-245-13\).pdf](http://www.oas.org/en/iachr/decisions/pdf/Resolution5-13(MC-245-13).pdf)

⁴⁸ Gaceta Oficial No 29 Extraordinaria de 17 Junio de 2014. Available at http://www.mtss.cu/sites/default/files/decretos/codigo_de_trabajo_2.pdf

⁴⁹ The Cuban Law on Foreign Investments of 2014, see Chapter XI, art. 30-31: http://www.cubadebate.cu/wp-content/uploads/2014/04/GO_X_20_2014_gaceta-ley-de-inversion-extranjera.pdf. Also see: Catalogue with opportunities: *Cuba – Cartera de Oportunidades de Inversión Extranjera*, Ministerio del Comercio Exterior y la Inversión Extranjera, 2014

This policy creates various challenges when it comes to the rights of human rights defenders, especially trade union leaders. According to the new labour code, employees only have the right to form trade unions that follow the “unitary principles”, i.e., being part of the Central de Trabajadores de Cuba, CTC - the only officially recognized trade union in the country which is closely allied with the government. Cuban law does not allow workers to join forces independently and negotiate collectively with employers – be they national companies or government workplaces.

When it comes to foreign companies investing in Cuba, all workers, with the exception of the top management and administrative body, are to be recruited and employed by a government appointed employment agency and not by the foreign investor itself. The law also specifies that when one of these companies “considers that a specific worker does not meet its demands at work, they can request that the employment agency replace that person with another.” Another provision sets out that any labour disputes are to be resolved “within the employment agency”, and not at the company.

These regulations have remained the same since the early 1990s when the Cuban government first opened up the economy for foreign investment. Their retention in the new legislation suggests the government intends to continue the same process, which would oblige foreign companies to abide by the regulations. The catalogue with “opportunities”, mentioned above, specifically states that the objective of the employment agency is “to supply and control the workforce” and that payment “is negotiated between the agency and the company”.

As a result, the Cuban government maintains its basic monopoly on employment, Cuban workers cannot join or form independent trade unions, and foreign investors cannot let their employees create their own unions. These state requirements radically undermine workers' rights in Cuba. Hence, there are no independent Cuban trade unions that have any experience of working together with foreign investors to protect the rights of employees.

Carillo’s case is not unique. There are other political prisoners, as well as dissidents, human rights defenders, and journalists in Cuban jails. As more companies consider investment opportunities in Cuba, they should recognise the political and human rights context in Cuba.

They will need to undertake rigorous human rights due diligence and carefully examine how they can operate in Cuba while adhering to international human rights standards. Investors will also face the challenge of adapting to the law on foreign investments without breaching their own human rights policies, including their commitments to their own staff elsewhere in the world, as well as the UN Guiding Principles for Business and Human Rights (UNGPs).

The UNGPs define the roles of governments and businesses when it comes to protecting and respecting human rights. When the Human Rights Council endorsed them unanimously in 2011, Cuba was part of the Council. These principles are therefore a good starting point for responsible foreign companies to discuss with the Cuban government how to minimize the negative human rights impacts of their investments. If more businesses are going to invest in Cuba, a test will be if the Cuban political space respects human rights, so that labour rights leaders like Iván Hernández Carrillo, are able to work freely and protect the rights of Cuban workers.

CESAR ESTRADA CHUQUILÍN

By Andrea Rocca⁵⁰

César Estrada Chuquilín is a journalist based in Bambamarca, Peru. He presents a radio programme called “*Pulso Informativo*” on Radio Coremarca and is a member of the Indigenous Communication Network of Peru – REDCIP (*Red de Comunicadores Indígenas del Perú*). He frequently reports on protests against a large gold mine project in Conga. One of the issues he has focused on is the community’s consent for the project. In many mining operations around the world, obtaining free prior informed consent from local communities is a contentious issue. In December 2012, Estrada alleged that signatures purportedly showing local community support for the Conga mining project had been obtained fraudulently. Newmont Mining Co, which has the majority stake in the project, says the project had conducted an extensive community consultation process.⁵¹

Estrada has reported that he has repeatedly been targeted because of his work. In July 2013, while on a visit to the Conga site to report on a protest, a group of police officers of the Division of Special Operations of the Peruvian National Police (DINOES) and other individuals in orange safety vests stopped him.⁵² Estrada says he was insulted, kicked and hit on the head with the back of a rifle. His camera, cell phone and wireless modem were taken away from him.

In February 2014, police officers visited Estrada’s home at 4 am and questioned him about his work and protests on the Conga site. Later that same day, as he went to the highlands to report on a planned protest, he was again victim of an assault by police officers, which left him unconscious. The police took away his laptop. Later the same day, Estrada’s Facebook account was hacked and a message was posted saying “I sold myself for money”. In the same month of February 2014, fabricated charges of theft and financial irregularities were brought against him; at the time of writing the case remains pending.

Estrada’s family has not been spared. Estrada's father has reported that he received death threats on account of his son's work, including in February 2014 and then again in 2015, in February, July and November. In one instance, unknown individuals visited his house and threatened him in person.

On 5 May 2014, the Inter-American Commission on Human Rights issued an order for precautionary measures in favour of César Estrada, together with a number of other beneficiaries. However, merely a week after the IACHR order, on 13 May, he was detained while on a planned visit to inspect the level of water reserves in El Perol, on ancestral communal territory. The authorities had been informed of the visit and its

⁵⁰ The author would like to thank Renata Oliveira for her help researching this case.

⁵¹ According to Newmont Mining Co, the community consultation process resulted in the official “*audiencia publica*” and was approved by the Ministry of Energy and Mines in March 2010. Newmont has said that the project will only move forward provided it has gained social acceptance and is economically viable.

⁵² Newmont says it has allowed protesters to enter company property to conduct meetings but security – both private and public – is used to protect company property and staff if violence is likely, and some protests have been violent.

purpose. Together with Estrada, 12 other individuals, *campesinos* and *ronderos*⁵³ were also arrested. They were released the following day.

In November 2014, the office of the prosecutor in Celendin asked for a sentence of 30 years imprisonment and a fine of 8,000 PEN (approximately €2,150) for Estrada and two *ronderos* on charges of alleged kidnapping and aggravated robbery in November 2013. According to Estrada, two witnesses could confirm that he was elsewhere on the day of the alleged kidnapping; however, they were not summoned or interrogated by the prosecutor. The charges remain pending at the time of writing. Nine months earlier, Estrada had filed a complaint against the same prosecutor for abuse of power, which was dismissed.

In November 2015, Estrada was the victim of what appeared to be an attempted killing. Upon entering the bus station in the city of Cajamarca to travel to Lima, he was approached by unknown men on a motorbike that pointed guns at him. His wife and a friend stepped in front of him to protect him and the gunmen fled shouting "One day you will not be accompanied". While the attackers or their motives remain unknown, Estrada believes the incident is related to his opposition to mining activities in the area.

Since the early 1990s, Peru's extractive industry has grown exponentially. Mining licences have been awarded for vast parts of the national territory. In the Cajamarca region, which is home to South America's largest gold mine, Yanacocha, mining concessions accounted for 45.2% of the territory.⁵⁴ The US-based Newmont Mining owns 51.35% of Minera Yanacocha, the Peruvian company *Compania de Minas Buenaventura* owns 43.65%, and the World Bank's private sector lending arm, International Finance Corporation has a five percent stake.⁵⁵

The areas included in these concessions are home, to a large extent, to a rural population including *campesinos*, some of them indigenous, which relies on subsistence farming. Some local communities have denounced the lack of consultation on mining projects, irregularities in the appropriation and transfer of communal land, as well as the dramatic consequences of mining on the environment, the local flora and fauna, the health and livelihood of local communities and on their traditional way of living.

There is strong local opposition to the growing impact and presence of extractive industries and that has resulted in intense social protests in the areas affected. Some protests have turned violent, but the public security forces' response has been criticized for being excessive.⁵⁶

Further concerns emerged in December 2013, when an NGO reported on the existence of agreements between the national police and several mining companies for the provision of 'extraordinary additional security services'. Under such agreements, the police conduct routine patrols on behalf of the companies to "prevent, detect and

⁵³ The *Rondas Campesinas* (Peasant Patrols) are recognised by Article 149 of the Constitution of Peru and by Law N° 27908, which defines it as a "democratic and autonomous" Andean communal institution exercising functions of local government, administration of justice, conflict resolution, and public order.

⁵⁴ Observatorio de Conflictos Mineros, 13° Informe, December 2013, available at http://www.cooperaccion.org.pe/OCM/XIII_OCM_2013-12-12br. The figure refers to mining concessions, not to actual exploitation.

⁵⁵ See <http://www.newmont.com/operations-and-projects/south-america/yanacocha-peru/overview/default.aspx>

⁵⁶ In July 2012, the government declared a state of emergency in three provinces in Cajamarca. In the city of Celendín, four protesters were killed when the police and army used live ammunition.

neutralise” threats. This effectively results in the police acting as a private security agency for the companies.⁵⁷ Nicholas Cotts, Newmont’s group executive for sustainability and external relations, confirmed that it does enter into memoranda of understandings (MOUs) with the Peruvian National Police, which it sees as consistent with best practices outlined in the Voluntary Principles for Security and Human Rights.⁵⁸

Newmont Mining is a signatory of the Voluntary Principles for Security and Human Rights which brings together companies in the extractive sector, governments and civil society groups to engage in a dialogue regarding security and human rights. The Voluntary Principles aim to ensure that in protecting a company’s people and assets private and public security forces recognize and protect human rights and, when necessary, public security use of force is proportional to the threat to ensure law and order.

Cotts explained: “Yanacocha actively provides human rights training and briefings to both private and public security forces as part of their commitment to the Voluntary Principles on Security and Human Rights prior to interacting with any planned protest events occurring on company property. Training and briefings include a review of the company’s expectations regarding overall respect of human rights, appropriate use of force proportional to any threat, and behaviour of the security forces with a goal of protecting people and property.”

In relation to protests which do not occur on company property, Cotts said, “[Yanacocha] can and does express the importance of protecting human rights to public law enforcement groups; however, it has little influence, and it may be argued should not have any influence, on public security actions occurring in areas not in close proximity to company activities.” When off-property incidents have occurred and were related to company activity, Yanacocha says that it has communicated with public security agencies to encourage open and transparent investigation and reporting. It has also made several affirmative statements supporting the need for public security forces to protect human rights during off property planned public protests related to company activities.

The case of Estrada is not unique. In the tense context of Cajamarca, several human rights defenders have said they have been the direct target of death threats, physical attacks, surveillance, stigmatisation, smear campaigns, and criminalisation when they are carrying out legitimate activities in the defence of the rights of indigenous or *campesino* communities, or when journalists are reporting abuses against them. Human rights defenders are, by definition, peaceful actors, and distinct from other protestors, some of who may have resorted to violence. Cotts says, “Yanacocha does not engage in death threats, physical attacks or criminalization, rather relies on the rule of law.”

⁵⁷ Coordinadora Nacional de Derechos Humanos, Derechos Humanos Sin Fronteras, Grufides and Society for Threatened People, *Police in the Pay of Mining Companies. The responsibility of Switzerland and Peru for human rights violations in mining disputes*, (December 2013). Available at: https://ia601903.us.archive.org/14/items/InformeSobreConveniosEntreLaPnpYLasEmpresasMineras_441/Inf_ConvP_NP_eng.pdf

⁵⁸ As per the Voluntary Principles companies are expected to have constant communication with and understanding with security forces, public and private, to ensure that in protecting company property and staff, the forces should act in ways that do not harm human rights of others, including communities and protesters.

Several human rights defenders have faced dozens of lawsuits, which in the vast majority of cases have eventually been dropped or ended with an acquittal, which, local experts say, suggests these were unfounded or frivolous in nature. Lawsuits and charges against human rights defenders appear to have been used as retaliation for the role of the accused in the protest movement rather than due to a genuine violation of the law.⁵⁹ Cotts says Newmont is not aware of any cases of unfounded court proceedings or undue use of the judicial system against human rights defenders. “The company must operate within the legal framework of Peru. The company has prioritised dialogue and engagement to resolve disputes or grievances; however, the legal system and processes are accessed for illegal acts committed against the company, its employees or assets including trespassing, vandalism or physical aggression towards employees,” he adds.

The Conga project represents the challenges posed by and abuses that are often alleged to have occurred when large development projects are planned and implemented where all procedures may not have been followed fully, including securing community consent. It also shows the gap between companies' real or declared view on the situation, especially when headquartered elsewhere, and the struggle and risks that human rights defenders face on the ground. Some scholars have used the Conga case to argue for the necessity of binding international obligations on corporate actors.⁶⁰ Such projects may have secured appropriate legal permits from governments, but they lack the social license to operate in the eyes of communities.

⁵⁹ Front Line Defenders, *Environmental Rights Defenders in Peru*, June 2014, p. 2, available at <https://www.frontlinedefenders.org/peru-reportonhumanrightsdefenders>

⁶⁰ Woods, Cindy S. “*It isn't a State problem*”: *The Minas Conga mine controversy and the need for binding international obligations on corporate actors*, in *Georgetown Journal of International Law*, Vol. 46 Issue 2 p. 629. Available at <https://www.law.georgetown.edu/academics/law-journals/gjil/recent/upload/zsx00215000629.PDF>

AMINUL ISLAM

By Salil Tripathi

The garment sector has grown at an astonishing pace in Bangladesh, from 384 export factories in 1985 to 4,296 in 2015. The number of people working in the sector has risen dramatically as well to some four million today,⁶¹ with over 80 per cent being women. Their ability to generate income has empowered women, a significant sociological impact in a conservative society.⁶² Bangladesh is a populous, agrarian country where other industries have not taken off, making a factory job in the city a major attraction for Bangladeshi women. The sector by far is the main foreign exchange earner for Bangladesh. In 2013–2014, the sector earned \$25.49 billion in exports (out of total exports of \$31.19 billion). It gained ground as a low-cost alternative to China, and is today among the world's leading apparel exporters.

Despite this growth in the sector, the working conditions for garment workers in Bangladesh have been appalling. Wages remain low – barely above the World Bank threshold for absolute poverty, at \$37 a month – while increasing by 77 percent to Taka 5,300 (\$68) per month only in November 2013,⁶³ after sustained campaigning. The wage increase in 2013 occurred after the catastrophic collapse of Rana Plaza, a factory in Dhaka, which killed over 1,000 workers and shocked the conscience of the world.

In spite of low wages, Bangladeshis flock to the factories because they see the jobs as a way out of rural poverty in a country where the large majority of people rely on subsistence farming for their livelihood. Local garment exporters claim that increasing wages would drive them out of business. There is some logic to their argument, because Bangladesh's main competitive advantage in garment exports is the plentiful supply of cheap labour. In addition, international brands, which place orders in Bangladesh do drive a hard bargain,⁶⁴ forcing local companies to squeeze costs wherever they can. The garment industry has moved from the industrialised west to Southeast Asia, then China, and now Bangladesh, and in those investment decisions, often the main variable considered has been wage costs.

Aminul Islam was president of two chapters (Ashulia and Savar) of the Bangladesh Garment and Industrial Workers' Federation. Many of Bangladesh's export-oriented factories are located in these outlying areas of Dhaka. Clothes made in these factories are sold in department stores and boutiques around the world. Islam was a leader of the Bangladesh Centre of Worker Solidarity, which campaigned for improved working conditions for the predominantly female workforce. He was popular with workers who

⁶¹ Bangladesh Garment Manufacturers and Exporters Association, <http://www.bgmea.com.bd/home/pages/tradeinformation>

⁶² Kabir, Naila *The Power to Choose: Bangladeshi Women and Labour Market Decisions in London and Dhaka*. Verso Books, (2001).

⁶³ Devnath, Arun 'Bangladesh Raises Minimum Wages for Garment Workers after Unrest', Bloomberg Business (13 November 2013), available at <http://www.bloomberg.com/news/articles/2013-11-13/bangladesh-garment-factories-to-stayshut-amid-worker-protests>

⁶⁴ Labowitz, Sarah, and Baumann-Pauly, Dorothée *Business as Usual is Not an Option: Supply Chains and Sourcing after Rana Plaza* New York University (2014) https://www.stern.nyu.edu/sites/default/files/assets/documents/con_047408.pdf

came to him frequently to intercede in cases and demand justice on their behalf. His phone was tapped and he was placed under surveillance by security agencies.

In 2010, Islam was arrested after he led protests against low wages because, his supporters said, his advocacy collided with powerful interests in Bangladesh. According to one report, some 30 Bangladeshi parliamentarians own or have interests in garment factories.⁶⁵ This means politicians have little incentive to pass legislation that may raise costs and reduce profit margins. Increasing wages would do both.

Islam had started work at the Shasha Denim garment factory in the industrial zones surrounding Dhaka, Bangladesh's capital. Factories stand in close proximity to one another in this crowded part of the city and noisy trucks carrying goods drive on the highway next to the factories. Hundreds of thousands of workers pour in and out of the concrete factories daily. At Shasha Denim, Islam was elected to a committee in 2005 to raise grievances with management. He was an effective leader. Within a year, the company fired him. He went to court and won, but he could only earn back wages; he still lost his job. He then trained himself to be a better advocate for workers' rights.

In 2012, he organised demonstrations against factories of the Shanta Group, whose clients included major brands, such as Tommy Hilfiger, Nike, and Ralph Lauren. On April 4 that year, a man and a woman came to his office, saying he was needed urgently to be present at a wedding. He left with them and never returned; two days later his body was found next to a highway some 61 miles north of Dhaka. His body bore marks of torture.

According to the *New York Times*, "Ordinarily, a murder in Bangladesh attracts little outside attention, but Mr. Islam's death has inspired a fledgling global campaign, with protests lodged by international labour groups and by European and American diplomats, including Secretary of State Hillary Rodham Clinton. This outside pressure is partly because so many global brands now use Bangladeshi factories. But Mr. Islam also worked for local labour groups affiliated with the A.F.L.-C.I.O., a connection to the American labour movement that has infused his death with geopolitical overtones. For years, mutual suspicion has defined the relationship between the Labour Federation and the Bangladeshi establishment. Citing labour abuses, the A.F.L.-C.I.O. is currently petitioning Washington to overturn trade preferences for Bangladesh, infuriating Bangladeshi leaders and casting suspicions on the domestic labour groups nurtured by the federation, including those where Mr. Islam worked."⁶⁶

The Bangladesh Garment Manufacturers and Exporters Association immediately demanded a full investigation into Islam's death. Labour rights groups in the United States demanded that the US government exert pressure on the government of Bangladesh to identify and prosecute the perpetrators.

The case remains unsolved.

⁶⁵ Chalmers, John: 'How Textile Kings Weave a Hold on Bangladesh', Reuters (3 May 2013), <http://www.reuters.com/article/2013/05/03/us-bangladesh-garments-special-report-idUSBRE9411CX20130503>

⁶⁶ Yardley, Jim: 'Fighting for Bangladesh's Labour and Ending up in Pauper's Grave' (*New York Times*, 9 Sept, 2012) http://www.nytimes.com/2012/09/10/world/asia/killing-of-bangladesh-labor-leader-spotlights-grievances-of-workers.html?_r=0

The problems with Bangladesh's garment exports sector are structural, and Islam's work is not finished. It goes on through valiant efforts of other activists, lawyers⁶⁷, union leaders⁶⁸, and organisers, who have persisted in fighting for workers' rights. Bangladesh has had two major disasters since. In 2012, a major fire at Tazreen Factory killed 112 workers.⁶⁹ Then in 2013 Rana Plaza, a building with many factories, collapsed, killing more than 1134 workers. The government has since lifted the minimum wage and foreign brands which buy garments from Bangladeshi factories and created two initiatives – Accord⁷⁰ and Alliance⁷¹ – aimed at improving factory conditions. Global unions have lobbied to increase compensation and long term medical assistance for injured workers and an arrangement is in place.⁷² More is needed.⁷³ With increased global attention on Bangladesh and workplace safety hopefully there will be improvements in future.

⁶⁷ Institute for Human Rights and Business podcast – *Voices: Sara Hossain* (30 November 2014) <http://www.ihrb.org/media-centre/voices/sara-hossain.html>

⁶⁸ Institute for Human Rights and Business podcast - *Voices: Nazma Akter* (30 December, 2014) <http://www.ihrb.org/media-centre/voices/nazma-akter.html>

⁶⁹ Clean Clothes Campaign. <http://www.cleanclothes.org/ua/2012/cases/tazreen>

⁷⁰ The Bangladesh Accord on Fire and Building Safety. <http://bangladeshaccord.org/>.

⁷¹ Alliance for Bangladesh Worker Safety. <http://www.bangladeshworkersafety.org/>

⁷² The unprecedented scale of the disaster led to a coordinated, systematic approach to ensure the victims, their families and dependents would not have to endure ill-health and financial hardship resulting from the death of a family member or life changing injuries. Details available here: <http://www.ranaplaza-arrangement.org/>

⁷³ Aizawa, Motoko, and Tripathi, Salil (2016). *Beyond Rana Plaza: Next Steps for the Global Garment Industry and Bangladeshi Manufacturers*. Business and Human Rights Journal (Cambridge), 1, pp 145-151. doi:10.1017/bhj.2015.12. <http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=10006469&fileId=S2057019815000127>

KHADIJA ISMAYILOVA

By Inna Bukshynovich and Miroslav Durdevic

Questions were raised when Swedish telecom company Telia Sonera bought a 38.1% share in the Azerbaijan phone operator Azercell through one of its holding companies⁷⁴ for \$180 million. Some critics said that the price was considerably lower than the estimated market value.

The prominent Azerbaijani investigative journalist Khadija Ismayilova,⁷⁵ who worked for Radio Free Europe/Radio Liberty and Organised Crime and Corruption Reporting Project (OCCRP), began looking into the story. Her award-winning investigations uncovered high level corruption in Azerbaijan, including lucrative and questionable business deals involving the Azerbaijani president's family members, and mismanagement in the state financing sector.

Khadija Ismayilova played a key role in disclosing the suspected ties between the Swedish telecom company Telia Sonera - partly owned by the Swedish and Finnish governments - and the Azerbaijani presidential family. She wrote an investigative article about Telia Sonera, which alleged that the presidential family was a secret shareholder in the Telia Sonera affiliate Azercell. According to the report Ismayilova wrote,⁷⁶ the deal led to transferring the shares to a local partner who had ties to the president and allegedly enabled the family to take over state assets, in return for all approvals and licenses needed for operating in the country.

Ismayilova was not concerned only about alleged corruption. She wrote that government control of mobile providers "raises serious questions about Internet surveillance and communications security within Azerbaijan". Organisations such as Media Rights Institute in Baku, which monitors media and campaigns for journalists' rights contend that the Azerbaijani government, which has a history of blocking websites that criticise it, heavily monitors the Internet in the country.

The Azerbaijani authorities targeted Ismayilova for her investigations. A smear campaign was launched against her in 2012, which included illegally obtained footage invading her privacy and the video was posted online. The material was obtained through surveillance equipment in her apartment.⁷⁷ She continued her investigative work, and on 5 December 2014, she was taken into custody by the authorities and held in pre-trial detention for two months, which was later extended for a further two months. Among the charges made against her was that she drove a former colleague to attempt suicide. She called the charge absurd. The day before her arrest, the head of the Presidential Administration of the Azerbaijan Republic, Ramiz Mehdiyev, published

⁷⁴ Telia Sonera invested in Azercell, found by Turkcell and local partners in Azerbaijan, in 1996.

⁷⁵ Details of the campaign to seek Ismayilova's freedom can be found here:

<https://www.occrp.org/freekhadijaismayilova/khadija-ismayilova.php>

⁷⁶ The article Ismayilova wrote in July 2014 after which she was arrested, can be found here:

<http://www.rferl.org/content/teliasonera-azerbaijan-aliyev-corruption-investigation-occrp/25457907.html>

⁷⁷ Several human rights groups have criticized the Azerbaijan Government over this. See Committee for the Protection of Journalists: <https://cpj.org/2012/03/azerbaijan-must-halt-smear-campaign-against-report.php> and Amnesty International <https://www.amnesty.org/en/latest/news/2012/03/azerbaijan-must-investigate-smear-campaign-against-radio-free-europe-reporter/>

a 60-page statement in which Ismayilova was named as “the best example” of journalists working against the government and accused her of treason claiming that she participates in “anti-Azerbaijani shows, makes absurd statements, openly demonstrates a destructive attitude towards well-known members of the Azerbaijani community, and spreads insulting lies.”⁷⁸

The charges of inciting suicide were dropped in April 2015. However, on 13 February 2015, the Azerbaijani Prosecutor General's Office charged Khadija with embezzlement, illegal business, tax evasion, and abuse of power. At a closed trial in late February, she was convicted in a criminal libel case and fined US\$ 2,382. In May 2015, Nasimi District Court of Baku extended Ismayilova's pre-trial detention further and on 1 September 2015 she was sentenced to seven and a half years in prison by the Baku Court of Grave Crimes on charges of embezzlement, tax evasion, illegal entrepreneurship and abuse of office.

Khadia Ismayilova has consistently denied all the charges, and international human rights groups believe she is being prosecuted in retaliation for her work as a journalist and her revelations concerning the presidential family. In her final statement in the court, Ismayilova said, “It is not a coincidence that these charges were brought against me. After all, I have talked and written in detail about these very same crimes myself.”⁷⁹

Patrik Hiselius, senior adviser digital rights at Telia Sonera said: “Critical voices and investigating journalists in Azerbaijan are in a very difficult situation. Both journalists and human rights activists have been imprisoned. We are closely following the development regarding freedom of speech-issues in all our markets. That of course includes her case. We don't take any position on individual cases, but we want all the journalists and NGOs, wherever in the world they work, to be able to scrutinize us without risking repercussions. In our freedom of expression policy we clearly state that we respect and support these human rights. This is also something we seek every opportunity to discuss with those in power in Azerbaijan and in other countries. We use the influence we have to push the country in the right direction by being there, by offering communications services and by discussing freedom of expression and press freedom.”

The top management of Telia Sonera has changed in recent years. On 18 April 2013, Telia Sonera announced that Norton Rose Fulbright, an international law firm, would conduct a review of its operations on behalf of the company's board. Since the review, and acknowledging that the company operates in countries with vastly different legal systems, in order to mitigate legal risks, including the security of employees in the countries as well as ongoing investigations, the company decided not to make the report public. “We are as transparent as possible with regard to circumstances and (we have) continuously handed over information to the Swedish prosecutors” when asked, Hiselius said. Telia Sonera has said⁸⁰ it would reduce its presence in the region in a responsible manner over time.

⁷⁸ The World Order of Double Standards and Contemporary Azerbaijan <http://ru.apa.az/news/282581>

⁷⁹ In June, Ismayilova wrote from jail: *Letter from Azerbaijan Jail: Khadija Ismayilova Speaks Out* The New York Times (11 June 2015). Available at http://www.nytimes.com/2015/06/12/opinion/letter-from-azerbaijan-jail-khadija-ismayilova-speaks-out.html?_r=0

⁸⁰ Telia Sonera Corp. *Telia Sonera is not a Long Term Owner in Region Eurasia* (2015) <http://www.teliasonera.com/en/newsroom/news/2015/teliasonera-is-not-a-long-term-owner-in-region-eurasia/>

International human rights groups and journalists' associations have continued to campaign for Khadija Ismayilova's release. She was reporting on business practices and investigating the role of the government and the President's family. Telia Sonera had invested in the companies and faced criticism over its presence in Azerbaijan. Human rights groups called upon the company to intervene in the case. Human rights groups make such calls because they believe that companies have influence over governments. Sometimes they do, sometimes they don't. The case underscores the dilemmas companies face if they intend to live up to the international standards of human rights to which they have committed.

MAMFAKINCH AND THE DIGITAL RIGHTS ASSOCIATION

By Andrea Rocca⁸¹

In May 2015, the Moroccan organisation *Association des Droits Numeriques* – ADN (Digital Rights Association) published a report with the UK-based organisation Privacy International, called *Their Eyes on Me*.⁸² It features personal accounts from human rights defenders, activists and journalists whose communications were the target of state surveillance.

ADN grew out of Mamfakinch (Arabic for “not giving up”), a citizen media outlet set up in 2011 around the time of the February 20th Movement, a series of protests that took place in Morocco during the Arab Spring. The report details the personal stories of, among others, Hisham Almiraat, Samia Errazzouki and Yassir Kazar, who were running and contributing to Mamfakinch. They were targeted with spyware developed and sold by the Italian company Hacking Team. The company’s main product is a remote control system that infects a target’s computer – desktop or mobile. It can bypass encryption and monitor the target’s communications and movements, even turning on a webcam or microphone.

The report *Their Eyes on Me* shows how the spyware was delivered via an email sent to the whole team at Mamfakinch encouraging the recipient to click on an attachment, which the sender said would reveal a major scandal. The attached document actually contained spyware, which granted the attacker complete remote access to the target’s computer. One of the activists targeted, Samia Errazzouki, lived 4,000 miles away in the United States at the time.

Toronto-based research organisation Citizen Lab identified the spyware as the one developed and sold by Hacking Team. The company has claimed that it only sells its products to governments and government agencies, which would mean the surveillance was state-sponsored.

In July 2015, Hacking Team was itself hacked, and thousands of its documents were published online, including contracts, invoices and emails, which revealed business relationships with clients, which included governments with poor human rights records.⁸³ It emerged that the Moroccan government had indeed purchased Hacking Team’s Remote Control System software.⁸⁴ Among the countries to which Hacking Team has sold such software are Azerbaijan, Bahrain, Egypt, Ethiopia, Kazakhstan, Russia, Saudi

⁸¹ The author would like to thank Mohammed el Sayeh for his help researching this case.

⁸² Privacy International and the Association des Droits Numeriques *Their Eyes on Me: Stories of Surveillance in Morocco* (May 2015). Report available at https://privacyinternational.org/sites/default/files/Their%20Eyes%20on%20Me%20-%20English_0.pdf. More information at <https://privacyinternational.atavist.com/theireyesonme>

⁸³ Hern, Alex: *Hacking Team Hacked: Firm Sold Spyware Tools to Repressive Regimes, Documents Claim* The Guardian (6 July 2015) <http://www.theguardian.com/technology/2015/jul/06/hacking-team-hacked-firm-sold-spying-tools-to-repressive-regimes-documents-claim>

⁸⁴ Privacy International: *Facing the Truth: Hacking Team Leak Confirms Moroccan Government Use of Spyware* (10 July 2015) <https://privacyinternational.org/?q=node/622>

Arabia, Sudan, and Turkey.⁸⁵ The international press freedom watchdog Reporters Sans Frontieres called Hacking Team an 'enemy of the Internet'.⁸⁶ In response, Hacking Team representatives said the company "goes to great lengths to assure that our software is not sold to [...] any 'repressive' regime."⁸⁷

Morocco is ranked 116th (out of 167) in the 2014 Economist Intelligence Unit Democracy Index – falling into the "authoritarian regime" category.⁸⁸ The index ranks countries based on criteria including electoral process and pluralism, functioning of government and civil liberties.

Long considered one of the few countries in the region where human rights defenders could operate in relative freedom, civil society space in Morocco has shrunk in the last two years. Privacy International relocated two workshops with ADN following police pressure on hotels and conference venues to cancel the event.⁸⁹

Not only were human rights defenders targeted by sophisticated surveillance equipment sold by Hacking Team, the government employed other, more traditional methods of intimidation against ADN. Authorities attempted to disrupt the launch event of the report. The host of the event, *Association Marocaine des Droits Humains* (AMDH) reported receiving a letter asking them not to go ahead with the press conference because ADN was not registered as a legal entity.⁹⁰ On the day of the launch, several police officers reportedly gathered in the area and prevented journalists from reaching the offices. Three days after the press conference, on 8 May 2015, the state news agency Maghreb Arab Press (MAP) published a news dispatch citing a source at the Ministry of Interior stating the Ministry had initiated an investigation into the report and the

⁸⁵ The *Intercept* and *Wired* provided many details. Their reports: <https://firstlook.org/theintercept/2015/07/07/leaked-documents-confirm-hacking-team-sells-spyware-repressive-countries/> and <http://www.wired.co.uk/news/archive/2015-07/06/hacking-team-spyware-company-hacked>

⁸⁶ Reporters Sans Frontieres: *Enemy of the Internet: Entities at the heart of censorship and surveillance* (2013). Available at <http://surveillance.rsf.org/category/societes-ennemis-internet/>

⁸⁷ McCullagh, Declan *Meet the Corporate Enemies of the Internet 2013* C-Net. (11 March 2013). Available at: <http://www.cnet.com/news/meet-the-corporate-enemies-of-the-internet-for-2013/>.

A Hacking Team consultant told C-Net in response to the report: "We regret that Reporters Without Borders has concluded that Hacking Team is somehow an enemy of anyone except criminals, terrorists, or others who abuse modern technologies. We work to help make the Internet a safer place by providing tools to police organizations and other government agencies that can prevent crimes or terrorism. Recently, in Spain, a Russian-led group bilked citizens of some 30 nations by hijacking their computers and demanding ransom. Investigation of a crime such as that one requires that police be able to monitor computer traffic of the criminals. Terrorists too rely on cell phones, computers, and the Internet to carry out their deeds. On the issue of repressive regimes, Hacking Team goes to great lengths to assure that our software is not sold to governments that are blacklisted by the E.U., the U.S.A., NATO and similar international organizations or any "repressive" regime. Furthermore, we have created an external board to review potential HT sales, and this board has a veto over sales it deems illegal or unwise. We also go to some lengths to monitor reports of use of our software in ways that might be inappropriate or illegal. When we find reports of such issues, we conduct an investigation to determine if action is needed. Under the terms of our contracts with clients, we have the authority to suspend support for the software that is used illegally, making it ineffective."

⁸⁸ Economist Intelligence Unit *Democracy and its Discontents: Democracy Index 2014* EIU (2015).

Available after registration at http://www.eiu.com/public/topical_report.aspx?campaignid=Democracy0115

⁸⁹ *Their Eyes on Me* (*ibid*, p9)

⁹⁰ ADN was created in May 2014 to raise awareness about, promote and undertake research on digital rights in Morocco and defend human rights in the digital space. It submitted a request for registration to the competent authorities, and was reportedly refused a receipt of the application. The press conference convened in 2014 to launch the organisation had to be postponed due to pressure exerted on the hotel, which cancelled the event at the last minute.

“people behind the report”.⁹¹

On 19 and 20 May 2015, ADN staff members including its President, Hisham Almiraat, reported that individuals believed to be police officers in plain-clothes made enquiries with neighbours and family members about their whereabouts, work and routine. In September 2015, the police questioned ADN Vice President Karima Nadir for five hours on suspicion of “false denunciation” and “insulting authorities”. Court proceedings against Hisham Almiraat on charges of “threatening the internal security of the State” began in November 2015.

Transactions like the one between Hacking Team and Morocco inevitably have implications for the right to privacy, particularly when the government in question uses software to target civil society organisations, human rights defenders and journalists.

Companies have the responsibility to respect human rights under the UN Guiding Principles on Business and Human Rights. The Hacking Team website provides its corporate policies, including a statement that the company undertakes human rights due diligence. The policy references a “know your customer” approach, “red flags” and evaluating the potential for misuse of their technology by their customers.⁹² The case shows the critical importance of rigorous human rights due diligence that can be verified and monitored.

The Internet has significantly enhanced the ability of human rights groups to document cases of abuse, share information and resources, connect with one another, and mobilise campaigns. But their reliance on the Internet also makes them vulnerable to surveillance and monitoring by government authorities. They expose themselves to digital security risks, including interception of communications and monitoring of Internet activities, as well as data theft and other actions aimed at compromising their work.

The Moroccan case shows how human rights defenders are vulnerable to surveillance and how surveillance-enabling software, if sold to governments that do not respect human rights, can increase defenders’ vulnerability, and in some cases, endanger their lives.

Hisham Almiraat believes that Hacking Team has a case to answer. He said, “First because they violated our privacy and also because those companies are destroying the extraordinary tool that the Internet is. I am afraid they are turning the Internet into something mediocre, only used for commercial purposes. What I see is that the stakes have been raised for ordinary people who want to express themselves. Those who do not want to cause any trouble and who have a lot to lose if their identity is revealed. Those who want to protect their privacy. It is a great loss for democracy that those people are discouraged from using the Internet as a tool for expression. People who have nothing to lose – like ISIS – will embrace the Internet. That is my theory: they have turned the Internet into something dangerous for those who wanted to take part in the public debate but had something to lose.”

⁹¹ El Yaakoubi, Aziz *Moroccan government sues authors of report accusing it of spying - state news agency*. Reuters (9 May 2015). Available at <http://uk.reuters.com/article/2015/05/09/uk-morocco-cybersecurity-rights-idUKKBN0NUOEW20150509>. For Privacy International’s response, see its *Statement about Moroccan Government’s Intimidation of Civil Society* <https://www.privacyinternational.org/?q=node/583>

⁹² <http://www.hackingteam.com/index.php/customer-policy>

RAFAEL MARQUES DE MORAIS

By Andrea Rocca⁹³

Rafael Marques de Morais⁹⁴ is an investigative journalist in Angola. Through his work, he documents and seeks justice for human rights violations. He has investigated high-level corruption and human rights abuses in the Angolan mining industry. He is the founder and director of Maka Angola,⁹⁵ a web platform dedicated to the fight against corruption and the promotion of human rights and democracy.

In 2011 Marques published the book *Blood Diamonds: Corruption and Torture in Angola*.⁹⁶ The book detailed the findings of Marques's investigation into human rights abuses connected to the mining of diamonds in the Cuango and Xá-Muteba districts of the Angolan province of Lunda Norte. It documented over 100 extra-judicial killings and hundreds of human rights violations, including torture, forced displacement and intimidation, which had taken place in the region at the hands of members of the army and private security contractors. Marques reported the complicity of high-ranking Angolan generals and several companies, including the state-owned Endiama, and a privately held company called Lumanhe (which is reportedly owned by a company registered in Caicos Islands, the ultimate ownership of which is not known). He also attempted to initiate a lawsuit against them for crimes against humanity in relation to the abuses. However, the attorney general closed the investigation in November 2012 and no further action on the abuses documented by Marques has taken place.

Following the attorney general's decision, in the same month of November 2012 nine of the generals named in the book filed a criminal complaint against Marques in Portugal, where the book was published. The generals accused Rafael Marques and the publisher Tinta-da-China of libel and defamation, and asked for compensation of €300,000. As it was a criminal defamation case, the state prosecutor intervened and requested the court to close the case on the basis that "the publication of the book fell within the legitimate exercise of the basic rights of freedom of information and expression," The case was dismissed.

Lawsuits however went ahead in Angola, where Marques initially faced nine criminal libel charges on the basis that the criminal complaint he brought against the generals in November 2011 was 'slanderous'. At the opening of the trial, in March 2015, he learned that an additional 15 charges had been added, for a total of 24 brought by nine army generals⁹⁷ and three companies.⁹⁸ Marques faced up to nine-years imprisonment,

⁹³ The author would like to thank Renata Oliveira for her help researching this case.

⁹⁴ Video of Rafael Marques de Morais speaking at the Oslo Freedom Forum is available here: <https://www.frontlinedefenders.org/RafaelMarquesdeMorais>

⁹⁵ Maka is an initiative dedicated to the struggle against corruption and to the defense of democracy in Angola, funded and directed by Rafael Marques de Morais. <http://www.makaangola.org>

⁹⁶ de Morais, Rafael Marques *Diamantes de Sangue: Tortura e Corrupção em Angola*. Tinta-da-China (2011)

⁹⁷ Gen. Manuel Helder Vieira Dias Jr., Minister of State and Chief of Military Staff of the Presidency of the Republic; Gen. Carlos Alberto Hendrick Vaal da Silva, Inspector General of the Armed Forces General Staff; Gen. Armando da Cruz Neto, former Chief of the Armed Forces General Staff, MPLA MP; Gen. Antonio dos Santos Franca, former Chief of the Armed Forces General Staff, MPLA MP; Gen. Adriano

and a fine of up to US\$1.2 million.

The use of criminal defamation charges to silence journalists and human rights defenders denouncing abuses is an established practice in some parts of the world. International and regional human rights groups have condemned such practices and requested states to expunge defamation as a criminal offence in their domestic systems in favour of civil defamation, which is generally deemed to be sufficient to protect reputation.⁹⁹

Furthermore, the investigation and court proceedings in Angola did not comply with international fair trial standards. Independent international trial observers concluded that the trial “was marred by significant irregularities in violation of the right to a fair trial.”¹⁰⁰ The failings, according to the observers, included violations of the right to a public hearing, the right to be promptly informed of the charges, the right to adequate time to prepare a defence, the right to protection against self-incrimination, the right to a fair and impartial tribunal, and the presumption of innocence.

Despite an out of court agreement with the prosecution that charges would be dropped if Marques made an agreed statement in court, the prosecution subsequently breached the agreement and requested his sentencing on the basis that the statement meant he had admitted guilt. In a hearing on 28 May 2015 which was supposed to formalise the out of court agreement, the Court instead accepted the prosecution's proposition and sentenced Marques to six months imprisonment, suspended for two years, and ordered the withdrawal of the book.

Diamonds produced in Angola are exported to international markets through intermediaries in Belgium and elsewhere, and after they are cut, processed, and polished in various countries, they are sold in up-market jewellery stores around the world. The diamond industry is conscious of its reputation and played a proactive role in supporting civil society efforts in the late 1990s to set up the Kimberley Process Certification Scheme, which was established to eliminate conflict diamonds from the international diamond trade. Jewellery stores have over the years become aware of the link between the products they sell and their origin – the Kimberley Process is one way the industry has attempted to root out bad practices. The Scheme, however, is criticised as being ineffective.

Ahead of the opening of the trial, in April 2015, leading jewellery companies Tiffany & Co. and Leber Jeweler issued a statement calling on the Angolan government to drop the charges against Marques.¹⁰¹ Subsequent to the sentencing, an open letter reiterating

Makevela Mackenzie; Gen. Antonio Emilio Faceira; Gen. Joao Baptista de Matos; Gen. Luis Pereira Faceira; and General Paulo Pfluger Barreto Lara (who eventually withdrew from the lawsuit).

⁹⁸ Sociedade Mineira do Cuango (SMC), a joint venture of ITM Mining, state company Endiama Mining, and Lumanhe; ITM Mining; private security company Teleservice.

⁹⁹ According to the UN Human Rights Committee, “States parties should consider the decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty”, General Comment No. 34 (2011), CCPR/C/CC/34.

¹⁰⁰ American Bar Association Center for Human Rights, Trial Observation Report: The Case of Rafael Marques de Morais, June 2015, available at http://www.americanbar.org/content/dam/aba/administrative/human_rights/trialobservationreport_rafael_marques.authcheckdam.pdf

¹⁰¹ <http://www.leberjeweler.com/journal/?p=2982> . Statement available at http://www.ishr.ch/sites/default/files/article/files/open_statement_by_jewellers_re_rafael_marques_-_22_apr_2015.pdf

the call to drop the prosecution of Marques was joined by Tiffany & Co., Leber Jeweler, Brilliant Earth and many personalities.¹⁰²

The actions of the jewellery companies provide a glimmer of hope. If more companies can proactively speak up on behalf of human rights defenders, even if the actions of the human rights defenders raise reputational issues for the industries, then that pressure can restrain the state from taking actions that violate human rights. This marks a refreshing departure from cases where businesses, especially those linked to the local political elite, seek support from the political elite or resort to defamation laws or other forms of prosecution or harassment, to intimidate human rights defenders and silence criticism. They should instead be addressing the merit of allegations or criticism made by human rights defenders. What these jewellery companies did is a good start, but it should be noted that other companies, including those involved in the extraction or trade of diamonds from Angola said nothing publicly about the case.

¹⁰² Ginsberg, Jodie *Philip Pullman, Jimmy Wales, and Steve McQueen join call for Angola to drop charges against investigative journalist* Index on Censorship (2 June 2015) <https://www.indexoncensorship.org/2015/06/philip-pullman-jimmy-wales-and-steve-mcqueen-join-call-for-angola-to-drop-charges-against-investigative-journalist/>

JOEL OGADA

By Andrea Rocca¹⁰³

Joel Ogada is a human rights defender and a farmer in Marereni, a rural township in Kilifi County, Kenya. He is member of the Kubuka Farmers' Association and the Malindi Rights Forum, a consortium of local community-based organisations working to protect the land rights of farmers in the region. The establishment of salt extraction companies in the area created conflict between residents and the salt factories concerning alleged illegal expansion of factories over indigenous ancestral land, evictions and displacement of local residents, and lack of recognition of community rights over communally owned land. Ogada has been among the most vocal and visible human rights defenders working on the issue. He has resisted eviction attempts reportedly made by the Kurawa Salt Company, whose land borders his, and his crops and house have been destroyed. He has faced threats, intimidation, detention and malicious prosecution.¹⁰⁴

On the night of 6 and 7 February 2013, a building belonging to Tana Delta Salt Company caught fire in unclear circumstances, causing damage worth KES 3 million (approximately €36,000). The police accused Ogada of having carried out the incident, although human rights groups have raised questions about the charges, as they believe they are motivated by Ogada's activism. Tana Delta is part of the same business group as Kurawa, which borders Ogada's land and which has made attempts to appropriate his land. Ogada was arrested, without a warrant, ten days after the incident, on 17 February 2013. He was taken to court the next day, where he denied the charges. On 16 May 2014, he was sentenced to seven years imprisonment on charges of arson, under Section 332(a) of the Penal Code, by a court in Garsen.¹⁰⁵ On 13 March 2015, his conviction was upheld on appeal, but the sentence was reduced to two years imprisonment, to run from the date of the first conviction.¹⁰⁶ He was released on 16 September 2015.

Conflict between communities and salt factories has been long-standing, and was the subject of a public inquiry by the Kenya National Commission on Human Rights (KNCHR) in 2005,¹⁰⁷ where the Commission concluded:

On one hand are the salt manufacturers – six corporate organisations enjoying their rights as investors (often without fulfilling their responsibilities) with the support and protection of the Government and, on the other hand, a community of over 50,000 citizens whose rights are continually violated and livelihoods compromised. Government officers had a symbiotic relationship with the manufacturers, where the latter sustain them with facilities like vehicles, accommodation, handouts etc., while the manufacturers benefited from protection by the Government at the expense of the rights of the rest of the

¹⁰³ The author would like to Mohammed el Sayeh for his help researching this case.

¹⁰⁴ Protection International *The Marereni Community* (2014) <http://protectioninternational.org/wp-content/uploads/2014/09/The-Marereni-Community.pdf>

¹⁰⁵ Front Line Defenders *Sentencing of Joel Ogada to Seven Years' Imprisonment* (2014) <https://www.frontlinedefenders.org/node/26006>

¹⁰⁶ Front Line Defenders *Update* (2015) <https://www.frontlinedefenders.org/node/28277>

¹⁰⁷ Kenya National Commission on Human Rights, *The Malindi Inquiry Report* (2006), available at http://www.knchr.org/Portals/0/Reports/Malindi_Inquiry.pdf

*community. Communal land tenure systems operated alongside individualised land tenure; but the latter was upheld as supreme so the majority population was subjected to injustice(s).*¹⁰⁸

Due to their work on the issue, community leaders and human rights defenders have been threatened, arrested and have also been subjected to judicial harassment.

The Ogada case is emblematic of the challenges human rights defenders may face in opposing businesses in countries with high levels of corruption and a judiciary lacking independence.¹⁰⁹ There are flaws in the process by which salt companies claim possession of lands along the coast. Ogada's lawyer says there is no court proceeding underpinning the evictions. In 2004, when the salt companies threatened them, Ogada went to court and obtained a preliminary injunction preventing the companies from evicting him. However, the companies returned after the preliminary injunction expired.

Activists have alleged that companies use incorrect, altered maps to advance their claims on ancestral land. When the companies started their activities in the area, Ogada's family had been living there for decades. Older unaltered maps present a different picture from the one shown by companies. Local communities allege that maps demarcating ancestral lands were modified in collusion with local authorities. The companies' maps show the families they wish to evict as squatters and with the support of local authorities and police they impose their terms on the families. Ogada challenged these prevailing practices.

Ogada's trial proceedings fell short of international fair trial standards.¹¹⁰ He was arrested without a warrant, and did not have legal representation until late in the trial, when the Malindi Rights Forum obtained support from the East Africa Law Society for counsel. In addition, the defence had not been allowed to cross-examine the key prosecution witness – a man who worked for the salt company as a night guard and who claimed to have seen Ogada at the time of the incident. He failed to appear in court, yet the sentencing was based on his statement, which the defence viewed as full of inconsistencies.

In his appeal, brought with the support of the Kenyan National Coalition on Human Rights Defenders, Joel Ogada maintained his innocence and raised concerns that his right to a fair trial had been violated.

Between the first instance and the appeal trial, in July 2014, Ogada's lawyer filed an application for bail pending appeal. In September 2014, when the court had scheduled to hear the application, the state counsel requested a postponement on the basis that he had not had enough time to review the application, despite the fact that it had been notified two months previously. During the bail hearing, held on 16 September 2014, Ogada's lawyer argued that Joel Ogada was not a flight risk, posed no risk to society, and that he would be willing to comply with any bail condition. Furthermore, his family had no source of income while he remained in detention. The state counsel suggested

¹⁰⁸ KNCHR (*Ibid.*), page 180.

¹⁰⁹ Kenya ranks 145 out of 175 in the Transparency International's Corruption Perceptions Index (2014) and 103 out of 175 in Judicial Independence Index (2012-2013): Available at <https://www.transparency.org/country/#KEN>

¹¹⁰ Protection International *Justice Delayed for Malindi Farmer and human rights defender Joel Ogada* (2015). Available at <https://protectioninternational.org/2015/03/06/kenya-appeal-put-off-imprisonment-malindi-farmer-defender-joel-ogada/>

that Joel Ogada would abscond if released, but did not elaborate on his assertions. On 6 October 2014, the court denied bail.

A month after his initial imprisonment, in March 2014, unknown individuals entered Ogada's land and destroyed his house. His wife and child had to relocate elsewhere as a result. His brother, who was looking after the crops and farm while Joel was in prison, was arrested for trespassing and possession of drugs, an accusation that was eventually dropped. Other family members living on Ogada's land were served eviction notices.

In prison, Ogada reported suffering an assault by prison wardens who used a club and the butt of a gun. The wardens claimed that he had broken prison rules. He sustained injuries and was taken to the prison dispensary, but the prison authorities reportedly refused to take him to a hospital. The Kenya National Commission on Human Rights visited the Malindi prison to inspect whether the prison facility was in line with relevant standards. The prison authorities allowed the visit but reportedly obstructed the meeting between KNCHR and Ogada.

Ogada has faced three additional court proceedings, which were closed down at the request of the prosecution for lack of evidence or ended with an acquittal. Overall, 14 cases remain pending against members of the Malindi Rights Forum.

NAW OHN HLA

By Andrea Rocca¹¹¹

On 30 December 2014, Naw Ohn Hla¹¹² staged a peaceful protest in front of the Embassy of China in Yangon, Myanmar's largest city and commercial capital. She was part of a demonstration of some 100 people, which called on the authorities to investigate the death of Khin Win, a farmer in her 50s. Khin Win was shot dead on 22 December 2014 when police opened fire on a group demonstrating against the Letpadaung mining project in Sagaing Region run by a Chinese company. Ohn Hla was arrested at the demonstration, together with fellow human rights defenders Sein Htwe, Ko Nay Myo Zin and Ko Tin Htut Paing. Two other human rights defenders involved in the protest, San San Win and Ko Than Swe, presented themselves to the authorities in January 2015, who then detained them.¹¹³

On 15 May 2015, the Dagon Township Court sentenced the six human rights defenders to prison with hard labour for a total of four years and four months on charges of rioting (Section 147 of the Penal Code); use of criminal force to deter a public servant from discharging his or her duty (Section 353); making statements causing undue public fear or alarm (Section 505(b)); and protesting without prior permission (Article 18 of the Peaceful Assembly and Peaceful Procession Law).¹¹⁴

They also faced similar charges under Article 18 in all the townships they crossed to go to and return from the protest. In the case of Ohn Hla, she was sentenced to four months in Lathe Township in July 2015 and to four months in Alone Township in August 2015, while proceedings in Kyauktada, Pabedan and Lamadaw townships remain pending. She is a long-standing activist on land rights and political imprisonment. She has been arrested at least seven times since the late 1980s and is the co-founder of the Yangon-based Democracy and Peace Women Network.¹¹⁵

The Letpadaung copper mine in the Monywa copper mine complex in Sagaing Region, central Myanmar, has been controversial for many years. In 2011, the project was sold to the Beijing-based Wanbao Mining Copper Ltd, with the Union of Myanmar Economic Holdings Ltd (UMEHL) as its partner, along with the Myanmar government.¹¹⁶ The mine wants to expand, and local communities are resisting the expansion plans.

Over the past 30 years, those responsible for the Monywa complex have had a difficult

¹¹¹ The author would like to thank Yaroslavna Sychenkova for her help researching this case.

¹¹² "Naw" is an honorific among Karen women.

¹¹³ Front Line Defenders *Detention of six human rights defenders participating in a peaceful protest* (2015). Details available at <https://www.frontlinedefenders.org/node/27959>

¹¹⁴ They received one year under Section 353, one year under Section 147, the maximum sentence of two years under Section 505(b), and four months under Article 18. See <https://www.frontlinedefenders.org/node/28727>

¹¹⁵ Video presentation of the Democracy and Peace Women Network at <https://www.youtube.com/watch?v=eTZqIqAHjs8>. See also <https://www.frontlinedefenders.org/node/23700> and <https://www.frontlinedefenders.org/node/28461>

¹¹⁶ Wanbao Mining Copper Ltd. (<http://www.wbmining.com/en/index.htm>) is a wholly owned subsidiary of state company China North Industries Corporation (NORINCO). UMEHL is conglomerate owned by the Burmese military. Wanbao and UMEHL own, respectively, 30% and 19% of the joint venture, while the remaining 51% is owned by the Burmese Government.

relationship with local communities.¹¹⁷ Protests against the Letpadaung mine intensified in 2012 when the company planned to expand its operations. Local communities, supported by human rights defenders, have campaigned against the mine on environmental and health grounds; they have also raised concerns over loss of livelihood as result of pollution, forced evictions and violence. In response to protests, during November 2012 the authorities used excessive force against demonstrators, which included the deployment of white phosphorus,¹¹⁸ and arrested community members and human rights defenders.

The project was temporarily halted in November 2012, when the government set up an inquiry commission headed by opposition leader Daw Aung San Suu Kyi. In March 2013 the Commission recommended that the project should continue, but called for fair compensation to those who lost their land and livelihoods. In December 2014, Wanbao began fencing in a disputed area, which led to further protests, clashes between police and local residents, and the killing of Khin Win. Fifty-eight organisations condemned police actions and called for a further investigation. They also demanded the establishment of a Letpadaung dispute commission and a new temporary halt to the development of the mine. None of these demands have been met.

Wanbao Mining has since embarked on philanthropic activities in the area, including supporting local development projects. It has also attempted to initiate a dialogue with the affected communities. But suspicion within communities remains high. Wanbao Mining has not publicly condemned the actions of the security forces, nor publicly called for restraint over allegations that the security forces have used disproportionate force.

Wanbao also agreed to hire consultants to conduct an Environmental and Social Impact Assessment (ESIA). The Assessment, published in January 2015, noted that communities would be affected by noise, traffic, dust and other adverse impacts and stated that four communities would lose their farmland, as they would be relocated and resettled because of project activities. The assessment proposed project mitigation measures to support relocated people, households, and communities. Finally, the ESIA proposed the initiation of a Community and Social Development Plan to provide economic opportunities for affected communities.¹¹⁹

Community-company conflicts are not uncommon, and occur in many parts of the world – both in countries that are democracies and those that are not. Myanmar is a society in transition, where the government and security forces have a long record of human rights violations. Since the reform process began in 2011, the country's relationship with the West has improved, although Myanmar is still subject to international scrutiny by the UN and others. Wanbao Mining is incorporated in China, which faces its own extremely poor record in terms of respecting human rights defenders and their work.

This case is representative of the repression human rights defenders and communities may face when government agencies are directly involved in business ventures: the

¹¹⁷ Amnesty International, *Open for Business? Corporate Crime and Abuses at Myanmar Copper Mine*, February 2015, pp. 5 and 6.

¹¹⁸ Fisher, Jonah *Burma Police 'used white phosphorus' on mining protestors* BBC (14 February 2013) <http://www.bbc.com/news/world-asia-21455087>

¹¹⁹ Environmental and Social Impact Assessment, Myanmar Wanbao Mining Copper Ltd, Letpadaung Copper Project, pp 187, 256, 346, January 2015, prepared by Knight Piesold Consulting, http://www.aecen.org/sites/default/files/final_version_of_esia_en.pdf

police and army, and the judicial and political authorities, may be used to persecute human rights defenders and those they are helping. While there is a greater risk of such repression in countries like Myanmar, it also occurs in countries with better human rights records, as some of the other cases in this report illustrate.

EVGENY VITISHKO

By Erik Jennische

Evgeny Vitishko is one of the core members of Environmental Watch of the North Caucasus, EWNC, and has been an active advocate for the environment in the region for many years. In 2012, EWNC¹²⁰ discovered and protested against a long fence built in a protected area around the luxury villa of Alexander Tkachev, the governor of Krasnodar region. In order to document the existence of the fence and other environmental violations, Vitishko, together with his colleague Suren Gazaryan, participated in a peaceful rally. During the rally, some activists wrote on the fence "Alex is a thief" and "Forest for the people". Gazaryan and Vitishko were accused of "deliberate destruction or damage to property resulting in significant damage and motivated by hooliganism", charges they denied.

Their trial in 2013¹²¹ suffered from serious flaws.¹²² The Supreme Court of the Russian Federation later noted violations of due process and other significant legal failures. Nonetheless, the Krasnodar court sentenced Vitishko and Gazaryan to a three-year conditional sentence with a two-year probation period. Soon, another criminal case was filed against Gazaryan, who then fled Russia.

In the lead up to Russia hosting the 2014 Winter Olympics in Sochi, Vitishko and Gazaryan decided to investigate the environmental impact of the Games. A few weeks before the Games' opening in February 2014, they published *Sochi 2014: Independent Environmental Report*.¹²³ After the report on the Sochi Olympics was published, the earlier conditional sentence against Vitishko was converted to a term of three years confinement in a penal colony.¹²⁴

International human rights groups¹²⁵ protested against his sentence and approached the International Olympic Committee (IOC). The IOC asked¹²⁶ the Games organizers if Vitishko's arrest was related to the Games. The organisers said it was not. The IOC accepted the explanation and its spokesperson Mark Adams said: "My understanding is [that Vitishko] broke [the terms of] that suspended sentence and was subsequently jailed. So our understanding is that it is not Olympic related." However, the reason the

¹²⁰ The website of Environmental Watch of North Caucasus is at <http://ewnc.org/>

¹²¹ <http://sochiwatch.org/2013/02/25/sham-trial-over-environmentalists-suren-gazaryan-and-evgeny-vitishko/>

¹²² The Vitishko case has been well-documented. Details of the trial are available at the following sites: <http://freevitishko.org/>, http://ewnc.org/files/sochi/Doklad-Sochi-2014_EWNC-Eng.pdf, <https://www.amnesty.org/en/latest/news/2015/04/russia-release-yevgeniy-vitishko/>, <https://www.frontlinedefenders.org/EvgenyVitishko>, <http://www.swedwatch.org/en/reports/olympic-violations>, <http://uk.reuters.com/article/2014/02/15/uk-olympics-vitishko-idUKBREA1E0CW20140215>.

¹²³ Environmental Watch of North Caucasus: *Sochi 2014: Independent Environmental Report*. Available at http://bellona.no/assets/Doklad-Sochi-2014_EWNC-Eng.pdf

¹²⁴ British Broadcasting Corporation: *Sochi Winter Olympics: Environmental Activist Jailed* BBC (12 February 2014). <http://www.bbc.co.uk/news/world-europe-26152047>

¹²⁵ Human Rights Watch: *Russia: Justice Fails Environment Activist at Appeal* HRW 12 February 2014. Available at <https://www.hrw.org/news/2014/02/12/russia-justice-fails-environment-activist-appeal>

¹²⁶ Grohmann, Karolos *IOC Seeks Clarification After Environmentalist Convicted* Reuters (13 February 2014) <http://uk.reuters.com/article/2014/02/13/uk-olympics-vitishko-jail-idUKBREA1C0WW20140213>

court suspended the probation (which led to Vitishko's imprisonment) was the publication of the report on the environmental consequences of the Olympic Games.

The IOC is not a corporation but it runs an enterprise that organises Olympic Games every alternate year, with a gap of four years between each summer and winter Olympic Games respectively. It works in close cooperation with the national Olympic committee of the host country. Besides, the Games are financed through media rights and sponsorship rights that are sold to international corporations. The IOC acts in the international entertainment market as any other producer of major events. The IOC does not have an explicit policy on human rights¹²⁷, nor does it have any systems in place to ensure that human rights are respected by the organisers, contractors, sponsors, or others associated with the games, and it has no way to monitor performance.

Even if the IOC is not a corporation, the IOC is a business partner of some of the world's largest corporations, many of which have advanced human rights policies. If these large corporations are to adhere to their own policies, they need to take steps to ensure that the IOC adopts a human rights policy and then puts in place credible measures to ensure its implementation to minimize the adverse human rights impacts of the Olympic games.

The broader implication of the Vitishko case is that it reinforces the need for proper human rights due diligence on the part of the IOC while evaluating candidate cities before the Games are awarded. The need for both a policy and a framework is clear.

¹²⁷ IOC's Olympic Charter states the values of peace, dignity, humanity, and non-discrimination. But it does not have the means or methods to implement or monitor the charter.

ZHAO LIANHAI

By Salil Tripathi

In November 2010, Zhao Lianhai, a Chinese activist whose child was among the 300,000 children who became ill after drinking adulterated baby milk, was sentenced to two-and-a-half years in prison for “inciting social disorder.”¹²⁸ Zhao had founded a website that gave information to parents after it was discovered that the milk formula that many Chinese parents had bought for their children was laced with the industrial chemical melamine. The chemical had been added so that the milk would show a higher protein reading, thus allowing it to be diluted without detection. Melamine is used to manufacture plastic products, fertilisers, and concrete. It is not edible, but if added to food products it returns a higher protein reading in tests. Its consumption, however, can cause kidney stones and lead to kidney failure. Six children are known to have died as a result.

China still maintains strict controls over information, especially information it deems politically sensitive. Given its tumultuous political history, Chinese governments value stability, and monitor the media, social media and the Internet to ensure that information that might provoke protest or unrest is filtered out. Many major international websites are inaccessible in China, and Internet service providers are tasked with applying government censorship directives. Individuals like Zhao, who offer alternative sources of information, play an important, if difficult role.

Zhao had worked previously for China’s food quality and safety authority. The milk contamination scandal shocked China late in 2008 when a fifth of the country’s milk suppliers were found to have been carrying adulterated milk, and thousands of children fell sick.¹²⁹ The news was suppressed until after the Beijing Olympics, despite several doctors having raised the alarm earlier in the year about the number of cases of kidney disease presenting in China’s hospitals. The scandal involved 22 dairy companies and prosecutions followed: some 20 people were convicted, of whom three were given the death penalty. The incident caused widespread anxiety over Chinese food safety standards and led to a global recall of Chinese dairy products.

China’s dairy industry is decentralised, with many small farmers selling milk directly to unregulated private middlemen at low prices. As competition grew more intense, some suppliers began to dilute the raw milk with water to increase the volume, adding melamine to disguise the dilution. The company at the centre of the scandal was Sanlu, a Chinese company that operated in partnership with a well known New Zealand dairy firm, Fonterra. Sanlu had kept quiet about the affair for several months, refusing to recall its products or issue any warning to parents. Fonterra, which had 43% stake in the joint venture, eventually insisted, threatening public exposure if there was no product recall.

¹²⁸ Branigan, Tania *Chinese Tainted Milk Campaigner Accused of Provoking Social Disorder* The Guardian (3 February 2010) Available at <http://www.theguardian.com/world/2010/feb/03/china-contaminated-milk-campaign-social-disorder>

¹²⁹ Traub, Daniel *Families of Sick Children Fight to find out true scale of the problem* The Daily Telegraph (3 December 2008) Available at <http://www.telegraph.co.uk/news/worldnews/asia/china/3545733/China-milk-scandal-Families-of-sick-children-fight-to-find-out-true-scale-of-the-problem.html>

Zhao led a movement¹³⁰ of parents to get justice for affected parents and healthcare and treatment for the children. He called for a national day to remember the victims and organised his own ceremony. He also set up a website, called jieshibaobao.com, or “Home for Kidney Stone Babies” from his home near Beijing. When the Chinese government blocked his site, he shifted it to a Japanese server. The site became a meeting point for parents affected by the crisis to exchange information to protect and fight for their rights. Zhao also called for more medical research and published a leaked government document which showed that authorities had asked staff to under-report kidney stone cases. In 2009, he argued that the government’s compensation plan should be rejected as inadequate and complained that parents were not being adequately consulted. Hundreds of parents signed a petition Zhao prepared. Soon, he began to suffer harassment and a press conference he called was disrupted.

In November 2009, Zhao was arrested¹³¹ for “picking quarrels and provoking trouble.” The prosecutors alleged his actions were disturbing social order. In November 2010, he was jailed for two-and-a-half years because he organised a gathering of 12 parents, held a sign in front of a factory and a court, and had given media interviews. He was released¹³² on medical parole, but remained under surveillance. In December 2010, when Hong Kong journalists went to his apartment to interview Zhao’s supporters, the building’s management committee disrupted the meeting and the journalists were assaulted.

In the introduction to *China and the Environment: The Green Revolution*, Isabel Hilton, editor of China Dialogue (and a member of IHRB’s International Advisory Board) wrote: “Continuing restrictions and harassment of individuals and organisations ... could be a disturbing signal of a return to authoritarianism, and could lead to more social unrest and street protest... The potential for a vibrant civil society is clear. Whether it is allowed to come into being is less certain.”¹³³

¹³⁰ Schiller, Bill *Father of Poisoned Baby Rallies Parents in Tainted Milk Fight* The Toronto Star (17 January 2009) Available at http://www.thestar.com/news/2009/01/17/father_of_poisoned_baby_rallies_parents_in_taintedmilk_fight.html

¹³¹ Dui Hua Human Rights Journal *Injuring the Injured: the case of Zhao Lianhai* Dui Hua Foundation (9 November 2010). Available at <http://www.duihuahrjournal.org/2010/11/injuring-injured-case-of-zhao-lianhai.html>

¹³² Amnesty International *Chinese Prisoner of Conscience Released from Prison* (13 January 2011) <http://www.amnestyusa.org/our-work/latest-victories/ua-31109-chinese-prisoner-of-conscience-released-from-prison>

¹³³ Hilton, Isabel in *China and the Environment: The Green Revolution* (Ed. Sam Geall, Zed Books, 2013).

CONCLUSIONS AND RECOMMENDATIONS

Ken Saro-Wiwa was not the first human rights defender challenging an economic paradigm or the first to question the conduct of a corporation to have been silenced. Others before him and many after him have been subjected to surveillance, intimidation, restrictions, investigations, prosecutions, arrests, torture, and in some cases, death.

Three things have changed since 1995: one, there is rising global awareness. Civil society groups have taken on the agenda vigorously and campaigned for the freedom of human rights defenders and mobilized public opinion. Two, governments around the world have accepted the contribution and importance of human rights defenders – and at least nominally – adopted a Declaration and annual resolutions at the UN recognising their role and the need to protect their freedoms. And third, more companies have realised they should engage with human rights defenders and communities that oppose their presence or practices.

Not all governments practice what they preach, nor have all companies come around to such a view. But the profusion of multi-stakeholder initiatives and calls for dialogue between companies and civil society groups are encouraging signs. Building on the Declaration on Human Rights Defenders, the Human Rights Council and the General Assembly pass annual resolutions on human rights defenders. The most recent, adopted in 2015, referred to the responsibility of business towards human rights defenders and called for their inclusion in meaningful consultations. At the fourth annual forum for business and human rights at the United Nations in Geneva in 2015, there was special focus on the role of human rights defenders, with special panel discussions and a prominent role for human rights defenders at plenary sessions.

Many companies now realise that wherever they operate, their ultimate licence to operate comes not only from legal agreements with governments, but also from their acceptance by workers, consumers, and the communities that surround them or are impacted by them. It does not mean that every company has got it right; nor does it mean it is always the fault of companies. In many instances, governments keen to build infrastructure, attract investment, or develop the economy are willing to disregard the views of communities, the rights of workers, or of consumers. Companies may benefit in the short term from actions governments take – a pollution standard undermined, a law changed to outlaw strikes, a parcel of land acquired without the consent of those who own or live on that land. Companies sometimes contribute to the problem by assisting governments to impose surveillance or providing logistical support that enables governments to take steps that may violate human rights. And in many instances, companies say nothing. To be sure there are examples of companies that have privately criticized governments over their human rights conduct, and in some cases, intervened on behalf of political prisoners or human rights defenders. But too little is known about such actions, which increases the perception that through their outward silence companies are beneficiaries of government actions.

The eleven cases outlined in this report are from all parts of the world and involve trade union leaders, journalists, and activists. There are many lessons to draw from their

experiences. Here, we provide recommendations for companies based on these narratives, so that corporate conduct supports, and does not undermine, human rights.

In order to develop an internal culture that respects human rights and an environment where human rights defenders can operate freely, companies should take a number of affirmative steps. These cover improving internal operating procedures, establishing proper dialogue and community engagement, undertaking due diligence, and resisting certain actions even if those appear to benefit the company's interest in the short run. Companies should also consider actions to intervene in specific cases or advocate certain positions provided such intervention or advocacy does not harm human rights defenders, and should establish credible, participative grievance mechanisms.

1. Improve internal operating procedures:

- a. Emphasise respect for human rights as a core part of company policies, codes of conduct, and training for employees.
- b. Make independent human rights impact assessment a requirement for new investments.
- c. Evaluate the viability of any investment carefully, if it exposes the company to the risk of being complicit in or benefiting from human rights abuses.

2. Establish proper dialogue and community engagement:

- a. Actively consult with affected communities, workers, and representative civil society groups in the company's area of operations.
- b. Ensure dialogue with all stakeholders, including human rights organisations or individual human rights defenders critical of business operations.
- c. Follow the principle of Free Prior Informed Consent to reach all affected constituencies to ensure meaningful consultation.

3. Undertake due diligence:

- a. Examine and investigate the record of local security forces and refrain from operating in locations where reliance on such forces would be necessary, if the security forces have proven record of engaging in gross violations of internationally recognised human rights.
- b. Consult with human rights organisations as part of due diligence before making an investment at home or overseas, to develop best practices and to identify local human rights defenders in order to establish a dialogue with them.

4. Resist actions that may undermine human rights:

- a. Ensure that local suppliers or subsidiaries do not initiate frivolous legal proceedings against human rights defenders, such as defamation or destruction of property.
- b. Refrain from interference in judicial proceedings through *ex parte* communications with judges or processes concerning the selection or removal of judges in trials involving human rights defenders.

5. Intervene in specific cases and advocate for human rights defenders:

- a. Inform the government clearly and in writing of objections when government forces use disproportionate force in their interactions with a community or human rights defenders related to company operations.

- b. Defend the rights of individuals and organisations to express their views, form associations (including labour unions) and peacefully assemble, including when such entities campaign against business activities on the basis of their actual or perceived adverse human rights impact.
- c. Intervene in cases where human rights defenders are under threat, and, publicly denounce any abuse of process that appears to benefit the company's interests in an unfair manner, provided such an intervention does not harm the defender.
- d. Call for the investigation of any threats or violence against human rights defenders or community members if related to company operations and investigate any accusations of complicity by subsidiaries or suppliers in any misconduct.
- e. Observe, or call for independent observers to monitor trials of human rights defenders charged in connection to their legitimate work.
- f. Report publicly on interactions with the government that may impact community members, where feasible and where it does not have adverse implications for human rights, particularly on matters involving the payment of royalties, contributions, and hiring of former government personnel.

6. Establish credible, participative grievance mechanisms:

- a. Establish a credible local grievance mechanism comprising company officials, representative local civil society groups, and appropriate experts, to review cases in dispute.
- b. In coordination with all relevant stakeholders, consider the establishment of a mechanism in the country of operations whereby adherence to best practices can be assessed.

Implementing these recommendations is not sufficient to ensure that human rights defenders will be able to operate in a safe, secure environment, without their rights being violated. The primary obligation for the protection of their rights – and the rights of everyone else – rests with the State. However, businesses can play a key role, and would ultimately benefit from an environment where human rights defenders can operate freely. If these recommendations are undertaken sincerely, everyone – governments, companies, and civil society groups – will achieve a safer environment, where rights are respected, protected, and eventually realised.

The space for civil society has been shrinking for some time. The collective might of governments and others with power, including companies, represent a whirlwind. Human rights defenders are strong, but they are like grass in the field. When the wind gathers speed, they bend. But they do not break; they rise again and stand tall.

Twenty years ago, after a trial that failed international standards, the Nigerian Government executed Ken Saro-Wiwa and eight other Ogoni leaders who were opposing the activities of Shell in the Niger Delta. It sparked global awareness on business' human rights responsibilities, leading to the development of standards advocacy, initiatives, codes of conducts, and principles for business and human rights. Despite UN General Assembly resolutions supporting their work, laws continue to be applied to restrict the activities of human rights defenders. As cases in this Paper show, journalists exposing corruption, Internet activists demanding accountability, and community activists campaigning for land rights have all faced pressure.

More than sixty governments have passed laws in the last three years to place restraints on the ability of human rights defenders to hold their governments to account. Among those targeted are individuals and organisations who challenge economic policies or business conduct. Human rights defenders' activities are being criminalized and they face surveillance, intimidation, lawsuits, arrests, and torture – in some cases, even death.

Companies are engaging with civil society, but mutual suspicions remain. Companies share common goals with human rights defenders - accountability, transparency, the rule of law, and due process. Companies should build on these common interests and engage human rights defenders, and where possible, speak out in their defence.

At a time of shrinking space for civil society, an ill wind blows over the landscape. Human rights defenders are strong, but they are like grass in the field. When the wind gathers speed, they bend. But they do not break; they rise again and stand tall.