

## Analysis

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# Extractive Industries Transparency Initiative (EITI) Validation: Myanmar

### INTRODUCTION

The International Center for Not-for-Profit Law (ICNL) welcomes the opportunity to provide input to the Extractive Industries Transparency Initiative (EITI) regarding the International Secretariat's *Validation of Myanmar: Report on initial data collection and stakeholder consultation* (November 2018). ICNL is an international organization that facilitates and supports the development of an enabling environment for civil society and public participation worldwide. Since its inception in 1992, ICNL has provided technical and research assistance to support the development of enabling laws and regulatory systems for civil society organizations (CSOs) in more than one hundred countries.

ICNL has been active in Myanmar since 2012. ICNL provided technical assistance to local civil society partners and parliamentarians on Myanmar's foundational Association Registration Law (ARL), enacted in 2014. Among other relatively enabling components, the ARL provides for voluntary registration of CSOs, in line with best practices and international law. While its implementation in Myanmar has been uneven, it remains one of the few recently enacted laws in Southeast Asia to encourage a more open, voluntary space for civil society. ICNL continues to be involved with legal reform efforts in Myanmar, working with civil society partners to monitor and provide technical assistance on new draft laws and advocate for reform of antiquated or restrictive laws. More recently, ICNL has provided legal expertise on the draft international NGO (INGO) bill and counter-terrorism measures.

ICNL has also contributed to the formation of the EITI Civil Society Protocol, instituted by the EITI in 2015. The Protocol provides guidelines to all 52 EITI member states for evaluating the ability of civil society to participate in the EITI. These guidelines inform overall assessments for countries within the EITI process, guiding how EITI requirements are satisfied, what weight they carry, and affecting whether countries can become full members. The Protocol was informed in large part by recommendations developed by ICNL with its partners at the Publish What You Pay (PWYP) Coalition. ICNL attended the June 2019 EITI Global Conference, and continues to stay engaged in developments in resource governance

from a public participation and civil society perspective.

The following analysis examines the section of Myanmar’s Validation Report entitled “Civil society engagement in the EITI process (#1.3).” It considers Myanmar’s “satisfactory” assessment in light of recent civic space developments in Myanmar, local CSO and partner reports, and relevant international standards on public participation and civic freedoms. In so doing, the analysis looks to the Protocol itself, offers commentary on its interpretation, and provides recommendations.

ICNL hopes that this examination of Myanmar’s EITI civic engagement assessment will be useful to the EITI Secretariat, including in determining whether Myanmar qualifies for full membership, and in further implementing the Civil Society Protocol. Our analysis is intended to assist the EITI in achieving its self-stated aim of ensuring “the active participation of civil society in the EITI process,” including free, public engagement and communication by civil society representatives on the EITI process and related transparency and natural resource governance issues.<sup>1</sup>

## Myanmar Validation Report, Civil Society Engagement Overview

The current 2018 Validation Report for Myanmar contains an 8-page assessment of civil society engagement in the EITI Process. It begins with a broad overview of the status of civic space in Myanmar, finding that Myanmar’s regulatory regime is highly restrictive on freedom of expression, with numerous laws used to restrict media, activists, and other civil society members – often resulting in self-censorship and the degradation of civic space overall.<sup>2</sup> The assessment specifically points out, however, that past prosecutions under such laws typically did not involve statements related to natural resource governance. The assessment also includes a paragraph discussion on threats to association and assembly, discussing concerns around implementation of the ARL and misuse of the Peaceful Assembly and Peaceful Procession Act to suppress assemblies and protests.

In a rather cursory fashion, the assessment then moves on to discuss civil society representation in the EITI process, in which MATA (the Myanmar Alliance for Transparency and Accountability), an umbrella organization of over 400 organizations and individuals,

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<sup>1</sup> See Protocol: Participation of civil society, EITI, [https://eiti.org/sites/default/files/documents/eiti-standard\\_protocol\\_participation-civil-society\\_en.pdf](https://eiti.org/sites/default/files/documents/eiti-standard_protocol_participation-civil-society_en.pdf), 41-43.

<sup>2</sup> *Validation of Myanmar: Report on initial data collection and stakeholder consultation*, EITI International Secretariat, November 2018, 26-27.

serves as the primary focal point.<sup>3</sup> Despite the previous sections detailing some of the widespread threats to civil society in Myanmar as well as stakeholder concerns around shrinking civic space, the assessment ultimately finds that MATA's free and active participation in EITI processes sufficiently merits the Myanmar government a "satisfactory progress" rating on civil society engagement.

Based on both the Civil Society Protocol and international standards relating to public participation and civic freedoms, this rating raises concerns, as does the depth of the civil society assessment used to justify it. A "satisfactory progress" rating is the highest degree of progress a country can attain under the EITI standard; it connotes that "*all* aspects of each requirement have been implemented and the broader objectives of the requirements have been fulfilled."<sup>4</sup> "Meaningful progress," on the other hand, means that "significant aspects of each requirement have been implemented and the broader objectives of the requirements are being fulfilled," while "inadequate progress" means that "significant aspects of each requirement have not been implemented and the broader objectives of the requirements are far from being fulfilled."<sup>5</sup>

## Assessment under the Civil Society Protocol

### *Civil society definitions and MATA's engagement in the EITI Process*

EITI requirement 1.3 specifies that civil society must be fully, actively, and effectively engaged in the EITI process.<sup>6</sup> The Civil Society Protocol further defines 'civil society' as those representatives "who are substantively involved in the EITI process, including *but not limited to* members of the multi-stakeholder group."<sup>7</sup> From the outset, it is important to note that this definition raises the need to consider the ability of members of civil society who are *not* included in or represented by members of the multi-stakeholder group (MSG) to engage in the EITI process. This is particularly true in the case of Myanmar, as MATA's engagement is reportedly concentrated in Naypyidaw and Yangon, and **efforts to involve civil society groups in EITI processes in other states have been largely unsuccessful.**<sup>8</sup> Moreover, despite its broad membership, there are only 9 members of MATA who participate in the

<sup>3</sup> *Id.* at 28.

<sup>4</sup> Degrees of progress – country status explained, EITI, <https://eiti.org/about/how-we-work#upholding-the-standard-internationally-validation>.

<sup>5</sup> *Id.*

<sup>6</sup> Guidance on civil society engagement (1.3), EITI, <https://eiti.org/guide/civil-society-engagement>.

<sup>7</sup> Protocol, *supra* note 1, at 41, emphasis added.

<sup>8</sup> Interviews conducted with national and regional members of MATA by local consultant, July-August 2019. Sub-regional MATA representatives report having significantly less access to the EITI process, and greater difficulties engaging with government and industry officials on EITI matters.

multi-stakeholder group. ICNL’s discussions with MATA representatives indicate that even these members have difficulty engaging fully and freely in the EITI process.<sup>9</sup> They report continual objections and opposition from government and industry representatives in the MSG, who tend to sideline or reject civil society concerns.<sup>10</sup> Furthermore, there is a chilling climate within the MSG, whereby discussion of the military’s interests are excluded, often out of fear, and MATA self-censors to avoid reprisals from members of industry, many of whom are closely aligned with the military and have powerful allies within the government.<sup>11</sup> Several civil society representatives are reported to have quit the MSG because of threats they received from government and business actors as a result of their participation.<sup>12</sup>

In addition to the challenges MATA faces throughout the process, there is **significant exclusion of many CSOs** working on resource and extractive issues in Myanmar who fall outside the official MSG and MATA’s umbrella. Local, rural, ethnic, marginalized, women, and indigenous groups – many of whom are disproportionately impacted by extractive industries – are even more likely to face systemic barriers in accessing both umbrella organizations and multilateral processes like the EITI, which are coordinated primarily at the national level.<sup>13</sup> According to the Special Rapporteur on the rights to freedom of peaceful assembly and of association, “[m]ultilateral institutions should redouble their efforts to meaningfully consult a wider variety of groups and make diversity of opinion the paramount factor in guiding their consultation processes.”<sup>14</sup>

Considered in that light, the Validation section on Myanmar’s civil society engagement

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> See the MSI report noting that “the 15 MSGs assessed in detail frequently failed to include or consider the perspectives of those living or operating in regions with extractive activity, such as local governments, affected communities, and grass-roots civil society. These stakeholders often have the greatest interest, knowledge, and concern regarding transparency in the extractive industry, yet are frequently either entirely unaware of EITI or feel unable to contribute to its process.” MSI Integrity, *Protecting the Cornerstone: Assessing the Governance of EITI Multi-Stakeholder Groups*, Feb 2014, page 9, <http://www.msi-integrity.org/wp-content/uploads/2015/02/MSI-Integrity-Summary-Protecting-the-Cornerstone-EN.pdf>. See also, e.g., S. James Anaya (Special Rapporteur on the Rights of Indigenous Peoples), *Extractive Industries and Indigenous Peoples: Report of the Special Rapporteur on the Rights of Indigenous Peoples*, U.N. Doc. A/HRC/24/41 (Jul. 1, 2014).

<sup>14</sup> Maina Kiai, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association*, para. 49, UN Doc. # A/69/365, (Sept 2014).

should be re-assessed under all of the provisions of the Civil Society Protocol.

*Restrictions and harassment of natural resource civil society actors*

Particular attention should be paid to Protocol provision 2.1 on Expression, stating that “Civil society representatives are able to engage in public debate related to the EITI process and express opinions about the EITI process *without restraint, coercion or reprisal*” – as well as provision 2.5 on Access to public decision-making, requiring that “*Civil society representatives are able to speak freely on transparency and natural resource governance issues*, and ensure that the EITI contributes to public debate.”<sup>15</sup>

Myanmar’s **restrictive climate on free expression** is well-documented; moreover, instances of repression and systematic policies in this regard appear to be on the rise.<sup>16</sup> Human Rights Watch’s January 2019 report entitled “*Dashed Hopes: The Criminalization of Peaceful Expression in Myanmar*” describes this “decline in freedom of the press under the new government” as “particularly striking.”<sup>17</sup> An array of laws (often related to criminal defamation or security) are regularly used to prosecute and harass activists, human rights and environmental defenders, media, journalists, and individuals who challenge the status quo.<sup>18</sup> **Land and resource issues are particularly sensitive, and free expression even more limited in this regard.**<sup>19</sup> In direct contravention to the claims in the Validation

<sup>15</sup> Protocol, *supra* note 1, at 41, emphasis added.

<sup>16</sup> See, e.g., Civicus’s rating of Myanmar as ‘repressed,’ Myanmar, <https://monitor.civicus.org/country/myanmar/> (last accessed Aug 8 2019); see also Severe restrictions to fundamental freedoms persist in Myanmar, CIVICUS, July 3 2019, <https://www.civicus.org/index.php/media-resources/news/united-nations/geneva/3922-statement-severe-restrictions-to-fundamental-freedoms-persist-in-myanmar>; *Dismal state of free expression today’s reality under NLD-led gov’t*, SOUTHEAST ASIAN PRESS ALLIANCE, Feb 2 2019, <https://www.seapa.org/myanmar-dismal-state-of-free-expression-todays-reality-under-nld-led-govt/>.

<sup>17</sup> Human Rights Watch, *Dashed Hopes: The Criminalization of Peaceful Expression in Myanmar*, Jan 2019, <https://www.hrw.org/report/2019/01/31/dashed-hopes/criminalization-peaceful-expression-myanmar/>. See also Human Rights Watch, *Myanmar: Surge in Arrests for Critical Speech*, Apr 26, 2019, <https://www.hrw.org/news/2019/04/26/myanmar-surge-arrests-critical-speech>.

<sup>18</sup> *Id.*

<sup>19</sup> See report noting that “some issues [in Myanmar] are still taboo, especially those related to government and private sector control of resources...CSOs are not encouraged to raise issues pertaining to unjust access to rights or resources involving the private sector (such as labour and land rights) and large-scale foreign investment projects.” Carine Jaquet, *Enabling Environment of Civil Society in Myanmar (Burma)*, RESEARCH INSTITUTE ON CONTEMP. SOUTHEAST ASIA, Jan 10, 2014, [https://www.civicus.org/images/Enabling\\_Environment\\_Civil\\_Society\\_Myanmar\\_CIVICUS\\_IRASE](https://www.civicus.org/images/Enabling_Environment_Civil_Society_Myanmar_CIVICUS_IRASE)

assessment, there have been numerous instances and reports of harassment, prosecution, and other violations of human rights around the extractive sector in Myanmar. **MATA members who work on extractive issues have been charged under various criminal laws**, often unrelated to their work, as part of efforts to intimidate them.<sup>20</sup> For instance, a member of MATA who posted on Facebook about water pollution near a Chinese investment project in Rakhine State was prosecuted by police under Section 66(d) of Myanmar's Telecommunications Act.<sup>21</sup> Civil society activists working on extractive issues in Shan State also report being spied upon by government actors and prosecuted under the Unlawful Associations Act Section 17 (1 & 2) for attempting to conduct awareness trainings and other activities around natural resources.<sup>22</sup>

Restrictions around assembly, including the refusal to allow events and other activities related to land or resources, are also well-documented.<sup>23</sup> **Peaceful protests relating to extractive projects in Myanmar have been banned, resulted in the arrests of protestors, and/or resulted in violent crackdowns.**<sup>24</sup> Civil society MSG members also note a host of cases where local officials have obstructed efforts to hold meetings explaining

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C.pdf. In general, human rights defenders operating in the extractive sector are particularly targeted, facing killings, torture, disappearance, arbitrary arrests and detention. See CIVICUS report, *Civic space under threat in Extractive Industries Transparency Initiative countries*, August 2017. Research further shows that the extractive sector is the most dangerous for activists, with attacks on human rights defenders working on business-related activities in over 35 EITI implementing countries in the last three years. Marion Mondain, *Protecting Civic Participation?*, PUBLISH WHAT YOU PAY, June 18 2019, <https://www.pwyp.org/pwyp-news/protecting-civic-participation/>. Conversations with local partners, Yangon, Myanmar, June 2019; interviews conducted by local consultant, July-August 2019.

<sup>20</sup> Interviews conducted by local consultant in Myanmar with members of MATA and CSOs, July-August 2019.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> See, e.g., Human Rights Watch annex detailing "the government's decision to prosecute peaceful protesters who on April 19, 2013, held a peaceful protest on Maday Island in western Burma's Arakan State... to publicize and demand action on their grievances against a major project to extract natural gas from the Shwe fields off the coast of Burma." Human Rights Watch, *Extractive Industries: A New Accountability Agenda Human Rights and the Extractive Industries Transparency Initiative*, May 21 2013, <https://www.hrw.org/news/2013/05/21/extractive-industries-new-accountability-agenda>.

HRW and other groups note that Myanmar authorities have also used violent force against anti-mining protests near Monywa, Sagaing Region. See also CIVICUS report, *supra* note 19 at page 13.

EITI to residents.<sup>25</sup> On another occasion in Kayah State, the government prohibited MATA from holding a press conference on land acquisition issues.<sup>26</sup>

MATA members have also confirmed that they are not free to conduct EITI-related activities in Shan State, Mandalay, and Rakhine State, among others.<sup>27</sup> They note that civil society is even more restricted at the state and regional level, with difficulty accessing decision-making processes and direct threats to expression, assembly, and association rights for CSOs – particularly those working on resource issues, including **denial and delay of permits to hold events or conduct EITI meetings and workshops**.<sup>28</sup> There is generally a lack of access to data and open information relating to natural resource activities on the ground, particularly in ethnic states.<sup>29</sup> There are also reports that different regional and state ministries issue instructions to limit freedom of association for CSOs pursuing activities which impact or relate to resource governance and EITI initiatives.<sup>30</sup>

These trends reflect a **greater shrinking of civic space** that has continued unabated under the National League for Democracy (NLD) government. Very little progress has been made to repeal or reform those laws used frequently against government critics, while legislative proposals expected to come before Parliament threaten to further erode protections for civic space.<sup>31</sup> Civil society representatives are purportedly being intentionally excluded from legislative consultations and policymaking, and are increasingly viewed as ‘the enemy,’ or being in opposition to the government.<sup>32</sup> Indeed, ICNL has received reports that the General Administration Department (GAD) is instructing officials to prohibit and limit CSO activities and civic space.<sup>33</sup>

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<sup>25</sup> See, e.g., Thomas Kean, *EITI brings risk, influence for Myanmar civil society*, MYANMAR TIMES, Nov 16 2014, <https://www.mmtimes.com/national-news/12296-eiti-brings-risk-influence-for-myanmar-civil-society.html>. CSO and MATA representatives relate being repeatedly asked if their activities or organizations are “legal.” *Id.* and *supra* note 21.

<sup>26</sup> Interviews conducted by local consultant in Myanmar with members of MATA and CSOs, July-August 2019.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Article 19, *Myanmar: UN HRC must keep scrutiny on free expression situation*, Mar 4 2019, <https://www.article19.org/resources/myanmar-un-hrc-must-maintain-scrutiny-on-free-expression-situation-2/>.

<sup>32</sup> See *supra* note 19.

<sup>33</sup> Conversations with local partners, Yangon, Myanmar, June 2019; interviews conducted by local consultant in Myanmar with members of MATA and CSOs, July-August 2019.

Much more could be said about violations of civic freedoms and the persecution of civil society representatives for holding peaceful activities or attempting to express opinions, in particular related to resource policy. For the purposes of brevity, it is enough to conclude that restraint, coercion, and reprisal are all present in Myanmar's public spaces, and are having a **chilling effect** on discussions around transparency and natural resource governance issues. This restrictive climate results in **significant self-censorship in the CSO sector**, which, in past EITI validations, has sufficed to reduce a country's assessment from satisfactory to meaningful progress.<sup>34</sup>

#### RECOMMENDATIONS & CONCLUSION

ICNL makes the following **recommendations** with respect to the EITI Secretariat Validation Assessment:

- In considering the ability of civil society organizations – both within and outside the Multi-Stakeholder Group – to engage EITI processes, the EITI should make note of the significant constraints, threats, and harassment facing civil society actors working on extractive and EITI issues;
- Additional information-gathering should be undertaken regarding specific instances of coercion, restraint, and reprisal that have affected civil society actors working on natural resource governance or the EITI, and resulted in chilling effects and self-censorship;
- Such information-gathering should ideally be conducted across a wide swath of local CSOs (ideally in multiple states and ethnic areas), and could be cross-verified with existing reports and documentation from local, national, and international CSOs working on these issues;
- The Secretariat should also consider well-established local, media, and international reports relating to civic space, and examine how shrinking civic space concerns affect (arguably disproportionately) the natural resources sector;

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<sup>34</sup> See, e.g., the EITI's 2016 Validation of Tajikistan, finding that the country has made meaningful, but not satisfactory progress on 1.3 due to a key concern surrounding the ability of civil society to freely express opinions about natural resource governance. *Validation Tajikistan 2016 – reports*, EITI, <https://eiti.org/document/validation-tajikistan-2016-reports>.



- Taking into account this additional information, it would be prudent to **reassess the Validation's current progress rating** for civic engagement in Myanmar, with the idea of encouraging both the government and relevant EITI actors to improve public participation and civic space issues surrounding resource governance in Myanmar;
- In future engagements with the government of Myanmar, EITI actors could emphasize the need to protect, rather than prosecute or harass, civil society actors working on natural resource issues – including through the repeal of repressive laws, as well as the incorporation of civil society protections and enabling measures; right to information provisions; and better public participation laws and standards.

A rigorous review of civic engagement will be instrumental in establishing a more inclusive, robust EITI regime in Myanmar. Such a reassessment is needed to meet the criteria laid out in the EITI Civil Society Protocol, and to provide additional legitimacy and buy-in to the process, from both the perspective of the Myanmar public and civil society, as well as foreign governments and international actors.

## Appendix

### Public Participation and Other International Law Standards

ICNL was closely involved in supporting the Office of the United Nations High Commissioner for Human Rights (OHCHR) to prepare guidelines for States on the effective implementation of the right to participate in public affairs. It has since been assisting the OHCHR with implementing the guidelines at the national level through enabling legislation that meaningfully realizes the right to participate for citizens and CSOs.

Listed below are some of the guidelines and standards on public participation that were used to inform the Civil Society Protocol and relate to civic engagement on resource governance, public policymaking, and transparency in Myanmar.

Public participation in law and policymaking is guaranteed by various **international documents**, including the following:

- Article 25 of the International Covenant on Civil and Political Rights;<sup>55</sup>

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<sup>55</sup> International Covenant on Civil and Political Rights adopted by UN General Assembly resolution 2200A (XXI) of 16 December 1966, <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

- Article 8 of the UN Declaration on Human Rights Defenders;<sup>36</sup>
- UN HRC Resolutions A/HRC/RES/24/83 and A/HRC/RES/27/24 on equal political participation;<sup>37</sup>
- UN Resolution 53/144 Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms;<sup>38</sup>
- Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (“*Aarhus Convention*”);<sup>39</sup> and
- World Bank publications, including for example “A Call for Participatory Decision-Making: Discussion Paper on World Bank- Civil Society Engagement”.<sup>40</sup>

Article 25 of the **ICCPR** stipulates that “Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives.” Article 2 of the ICCPR further provides an obligation to State Parties to respect and ensure the rights to all individuals “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

The **Aarhus Convention** also guarantees the right to public participation, particularly with respect to government transparency, accountability, and responsiveness in decision-making for “plans, programmes and policies relating to the environment.” It states

Each Party shall make appropriate practical and/or other provisions for the

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<sup>36</sup> General Assembly Resolution A/RES/53/144 adopting the Declaration on human rights defenders, <http://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Declaration.aspx>.

<sup>37</sup> UN Human Rights Council Resolution A/HRC/RES/24/8 on Equal political participation, <http://www.refworld.org/docid/53bcf9701a.html>; UN Human Rights Council Resolution A/HRC/RES/27/24 on Equal participation in political and public affairs, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/179/73/PDF/G1417973.pdf?OpenElement>.

<sup>38</sup> UN resolution 53/144 Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RightAndResponsibility.aspx>.

<sup>39</sup> Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters done at Aarhus, Denmark, on 25 June 1998, <http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>.

<sup>40</sup> World Bank, *A Call for Participatory Decision-Making: Discussion Paper on World Bank-Civil Society Engagement*, 2005.

public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public. ... To the extent appropriate, each Party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment.<sup>41</sup>

The Convention further imposes obligations on Parties and public authorities regarding access to information and access to justice. Regarding in particular the established right to information, both as part of public participation norms and more general international law standards, it bears noting that to date Myanmar has no right to information law (although various drafts ranging from progressive to highly restrictive exist), and still tends to suffer from a closed and secretive governance culture, which prevents civil society from effectively engaging in all sorts of important decision-making.<sup>42</sup>

The **OHCHR Guidelines** on the effective implementation of the right to participate in public affairs further emphasize states' obligations to "protect civil society actors, including human rights defenders and journalists, in particular women human rights defenders and women journalists."<sup>43</sup> The OHCHR also emphasizes states' obligations with respect to transparency, access to information, inclusion of marginalized groups, and perhaps most significantly, the right "to participate in public affairs at the supranational level, including in international organizations."<sup>44</sup> The OHCHR specifies that decisions made in international or regional organizations should be transparent and accountable, "*with the participation of those who will be affected by those decisions, and in an environment respectful of public freedoms.*"<sup>45</sup> It calls for the protection of civil society actors who choose to participate in such processes, and the need to ensure that public participation is not subject to acts of intimidation or reprisal.<sup>46</sup>

The **extension of public participation norms to multilateral institutions** is well-established in international law. Such norms thus apply to the EITI and inform best

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<sup>41</sup> Aarhus Convention, art 7, *supra* note 36.

<sup>42</sup> Conversations with local partners, Yangon, Myanmar, June 2019; interviews conducted by local consultant, July-August 2019.

<sup>43</sup> OHCHR, *Guidelines for States on the effective implementation of the right to participate in public affairs*, (g) page 7, [https://www.ohchr.org/Documents/Issues/PublicAffairs/GuidelinesRightParticipatePublicAffairs\\_web.pdf](https://www.ohchr.org/Documents/Issues/PublicAffairs/GuidelinesRightParticipatePublicAffairs_web.pdf).

<sup>44</sup> *Id.* at page 17.

<sup>45</sup> *Id.* at page 18, emphasis added.

<sup>46</sup> *Id.*

practices with respect to the Civil Society Protocol.<sup>47</sup>

The EITI has almost certainly provided one of the very first opportunities for many CSOs in various countries to directly discuss natural resource governance with the government and extractive industries. This is indeed both a positive development and a critical opportunity. However, commentators regularly note much room for progress, with civil society in many countries being either under or mis-represented within the multi-stakeholder groups, or possessing limited power to influence other stakeholders.<sup>48</sup> Publish What You Pay notes that civil society participation is often assessed against the background of a very limited scope, requiring a clear nexus between civic engagement and EITI processes, without taking into account the broader situation of fundamental freedoms in the country.<sup>49</sup> This sort of myopic approach risks delegitimizing the Civil Society Protocol and the EITI with respect to civic space assessments – particularly where it is well-established that a country, such as Myanmar, is experiencing shrinking civic space and significant challenges to civic freedoms.

As the **Special Rapporteur** on the rights to freedom of peaceful assembly and of association notes, “civil society engagement policies are an important first step in ensuring the right to freedom of association at the multilateral level, but they are not enough by themselves.”<sup>50</sup> Rather, multilateral institutions must engage not only in centralized policy-making to ensure public participation and civil society engagement, but in day-to-day operational accessibility, improved outreach and communication efforts, local and regional consultations in addition to national ones, and a robust individual complaint mechanism, in order to ensure that civil society is effectively engaged.<sup>51</sup>

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<sup>47</sup> See Maina Kiai, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association*, para. 49, UN Doc. # A/69/365, (Sept 2014).

<sup>48</sup> See, e.g., Päivi Lujala, Siri Aas Rustad, Philippe Le Billon, *Has the EITI been successful? Reviewing evaluations of the Extractive Industries Transparency Initiative*, U4 Brief, CHR. MICHELSEN INSTITUTE, 2017, <https://www.cmi.no/publications/6300-has-the-eiti-been-successful>. See also Siri Aas Rustad, Philippe Le Billon, and Päivi Lujala, *Has the Extractive Industries Transparency Initiative been a success? Identifying and Evaluating EITI goals*, 62 *Resources Policy* (2017) 151,160, [https://eiti.org/sites/default/files/documents/le\\_billio\\_et\\_al\\_2916\\_eiti\\_evaluations\\_metastudy.pdf](https://eiti.org/sites/default/files/documents/le_billio_et_al_2916_eiti_evaluations_metastudy.pdf), finding that “the key goal of engaging the public has been evaluated as only partially successful, with a relative success in terms of civil society groups participation in the MSG but a relative failure in terms of empowering the public to hold accountable the governments and companies.”

<sup>49</sup> Mondain, *supra* note 19.

<sup>50</sup> Maina Kiai, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association*, para. 49, UN Doc. # A/69/365, (Sept 2014).

<sup>51</sup> *Id.* at paras. 25, 44, 45, & 47.