

Business, Human Rights, and Uganda's Oil

Part II: Protect and Remedy: Implementing State duties under the UN Framework on Business and Human Rights

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Editorial

Business, Human Rights, and Uganda's Oil. Part One: Protect and Remedy: Implementing State duties under the UN Framework on Business and Human Rights

This paper is Part One of a four part series on business, human rights and oil in Uganda:

Part One: Uganda's oil sector and potential threats to human rights

Part Two: Protect and Remedy: Implementing State duties under the UN Framework on Business and Human Rights

Part Three: Respect and Remedy: Implementing corporate responsibility under the UN Framework on Business and Human Rights

Part Four: Civil Society: Holding the State and businesses to account

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Antwerp and Kampala, November 2013

ActionAid International Uganda is an anti-poverty agency that takes sides with poor people in Uganda to end poverty and injustice together. A human rights based approach defines our way of working because eradication of poverty and injustice can only happen if the rights of the poor and excluded people are protected, promoted and fulfilled.

International Peace Information Service (IPIS) is an independent research institute, providing governmental and non-governmental actors with information and analysis to build sustainable peace and development in Sub-Saharan Africa. The research is centred around four programmes: Natural Resources, Business & Human Rights, Arms Trade & Security, and Conflict Mapping.

Executive Summary

The following is the second in a series of four reports exploring business and human rights issues in Uganda's oil sector. This series is a collaboration between IPIS vsw and ActionAid Uganda.

In accordance with the UN Guiding Principles on Business and Human Rights, this second report assesses the duty of the State to prevent, investigate, punish and redress human rights abuse by businesses.

Uganda's duty as a state is to pass regulation to prevent human rights abuses against its citizens by businesses. Relevant areas of law include Uganda's Constitution, labour law and land law. National Human Rights Institutions play a key role in advising States on how such legislation can be formed, refined and applied.

Human rights may also be safeguarded via laws and policies that govern the creation of, investment in, and ongoing operation of businesses in Uganda's oil sector. Uganda's recently passed oil laws are particularly key in this regard. Human rights due diligence is a means by which business enterprises can identify, prevent, mitigate and account for the harms they may cause. There is potential for Uganda to require or encourage businesses operating in the oil sector to adopt human rights due diligence.

Uganda can also encourage companies to actively respect human rights through providing guidance to businesses, or encouraging / incentivising them to report on their human rights measures and impacts. It is also an option for such reporting to be legally required. In some situations, the local context requires particular sensitivity and specific guidance for businesses, such as in conflict-sensitive zones.

Uganda's "State-business nexus" offers particular opportunities. When the Ugandan State owns, controls, contracts, transacts with or influences a company, they have a particular opportunity, and responsibility, to ensure maximal respect for human rights. State institutions should be equipped with knowledge of how to ensure that businesses respect human rights. When States enter into investment treaties or contracts, they also have a clear opportunity to impart appropriate responsibility onto businesses.

Where human rights harms do occur, victims should have access to remedies. This can take place through State based judicial or non-judicial mechanisms, non-State grievance mechanisms, at the operational level or, alternatively, at the local, community-based level. Across these paths of remedy, the Ugandan State has a responsibility to ensure authenticity and effectiveness.

Home States also have a role to play in ensuring that their businesses' activity abroad is respectful of human rights. This can, as with the host State, be ensured through legally requiring certain standards, but may also be put into effect through guidance and / or encouraging / requiring human rights reporting. Home States may be an appropriate, and sometimes necessary, remedial avenue for those whose human rights have been affected.

Based on the opportunities for human rights promotion and respect identified above, this paper concludes with recommendations to the Ugandan, British, French and Chinese States.

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Acronyms

ACHPR	African Commission on Human and People's Rights (may sometimes also refer to the African Court on Human and People's Rights)
AfDB	African Development Bank
AGOA	US African Growth and Opportunity Act
BHRRRC	Business and Human Rights Resource Centre
CEPIL	Center for Public Interest Law
CNOOC	China National Offshore Oil Corporation
CRMU	The African Development Bank Group's Compliance Review and Mediation Unit
CSCO	Civil Society Coalition on Oil in Uganda
CSO	Civil Society Organisation
CSR	Corporate Social Responsibility
DIHR	Danish Institute for Human Rights
EIA	Environmental Impact Assessment
EITI	The Extractive Industries Transparency Initiative
ETO	Extra-territorial obligation(s)
EC	European Commission
EU	European Union
FCO	UK Foreign and Commonwealth Office
FES	Friedrich Ebert Stiftung
FHRI	Foundation for Human Rights Initiative
FIDH	The International Federation for Human Rights
GPs	The United Nations Guiding Principles on Business and Human Rights
HRC	The United Nations Human Rights Council
HRDD	Human rights due diligence
IA	International Alert
ICCPR	The International Covenant on Civil and Political Rights
ICSID	International Centre for the Settlement of Investment Disputes
ILO	International Labour Organisation
MEMD	Ministry of Energy and Mineral Development
MLHUD	Ministry of Lands, Housing and Urban Development
MNC	Multi-national corporation
NatOil	(Uganda's) National Oil Company (occasionally referred to as UGNOC)
NCP	National Contact Point of the OECD
NEMA	National Environment Management Authority
NGO	Non-governmental organisation
NHR	National Human Rights Institution
OECD	Organization for Economic Co-operation and Development
OHADA	Organisation for the Harmonisation of Business Law in Africa
OHCHR	United Nation's Office of the High Commissioner of Human Rights
PEPD	The Petroleum Exploration and Production Department (Uganda)
PSA	Production Sharing Agreement
SAIIA	South African Institute for International Affairs
SFI	Strategic Friends International
SOE	State-Owned Enterprise
UHRC	Uganda Human Rights Commission
UKTI	UK Trade & Investment
ULRC	Uganda Labour Resource Centre
UN	United Nations
UNGPs	The United Nations Guiding Principles on Business and Human Rights
VPs	Voluntary Principles on Security and Human Rights
WB	The World Bank

Introduction

The following report is the second in a four-part series on oil, business, and human rights in Uganda. The series has been produced in response to Uganda's nascent oil industry, and the hopes and concerns it has raised. The former include national wealth, rapid development, a highly trained workforce and a national health system. Yet commentators have pointed out potential risks to Uganda's political, economic, and social fabric, heightened risk of conflict, environmental damage, water rights, health, labour rights, and freedom of expression.¹

This report uses a UN Framework entitled *Respect, Protect and Remedy* to illustrate that all parties have specific roles and responsibilities to ensure that the impacts of business activities in oil extraction fall on the side of enabling and benefiting, rather than depriving, human rights.

The UN framework, also known as the *Ruggie Framework* (named after Special Representative John Ruggie who was at the helm of the Framework's creation) - and its accompanying *Guiding Principles* - were developed in response to global concern over businesses' impact on human rights. Past decades have seen mounting evidence that companies, either on their own or in partnership with governments, can have a profound impact on human rights. Yet attribution of responsibility has been problematic and at times unclear.

The Ruggie Framework sought to clarify where responsibility lies, and the Guiding Principles offer guidance to businesses and States on specific actions to take. The framework and guidelines look at the role that governments can play to safeguard human rights from damage by businesses, and the responsibility of businesses to take active steps to respect human rights. This series follows the Guiding Principles' structure, whilst also presenting a fourth paper on the complementary role of civil society.

This second report draws upon Guiding Principles' foundational principles One, Two and Twenty-Five – that States have the responsibility to protect their citizens from the adverse effects of business activity, and ensure access to remedy if harms do occur.

This report is a collaboration between IPIS vsw and ActionAid Uganda. Interviews were undertaken in Kampala by IPIS vsw in February and December 2013, and from Belgium thereafter, and further research by ActionAid Uganda, via their *Oil in Uganda* project, has been ongoing.

State responsibility

This report endeavours to map the Guiding Principles onto context of Uganda's oil industry in order to locate key issues and explore solutions. What follows is a summary of how this could look.

The Ruggie Framework takes a three pillar form: 1) the duty of States to protect people against abuses of their rights by third parties, including businesses; 2) the responsibility of corporations to respect all human rights; and 3) the need to enhance access to remedies by victims of rights abuses by companies. The Framework highlights that States bear the *primary* duty in this mix: to protect human rights within their territory, and arguably extraterritorially, from abuse by third parties, including businesses. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.

With regards to Uganda, this equates to firm regulations upon businesses that leave no space for human rights abuses, including through constitutional, labour, land, and environmental law. Transparency, freedom of information and anti-corruption also form integral parts of this picture. National Human Rights Institutions play a key role in advising States on how such legislation can be formed or refined.

Laws and policies that govern the creation of, investment in, and ongoing operation of businesses in Uganda's oil sector may also impact on human rights, notably corporate and securities law. Uganda's recently passed oil laws are a particularly relevant tangent to these. Human rights due diligence – a means by which business enterprises can identify, prevent, mitigate and account for the harms they may

¹ Wass G and Musiime C, *Business, Human Rights, and Uganda's Oil. Part I: Uganda's oil sector and potential threats to human rights*, IPIS Research and ActionAid International Uganda, (www.ipisresearch.be/download.php?id=413).

cause – is also a measure that Uganda may require or encourage businesses in the oil industry to adopt. Human Rights due diligence not only prevents harm, but also offers a method for judicial and regulatory bodies to assess an enterprise's respect for human rights.

Uganda can also encourage companies to actively respect human rights through providing guidance, or encouraging / incentivising of businesses to report on their human rights measures and impacts. It is also an option for States to legally oblige companies to report on human rights impacts. Meanwhile some areas are particularly complex and require specific guidance, such as companies operating in conflict-sensitive zones.

The State-business nexus offers an opportunity for the State to encourage particularly high standards from companies that the State owns, controls, contracts, transacts with or influences. Furthermore, State institutions should be equipped with knowledge of how they can ensure that businesses respect human rights while fulfilling their mandates. When States enter into investment treaties or contracts, they also have a clear opportunity to impart appropriate responsibility onto businesses, rather than, for example, limiting the State's future ability to update human rights-relevant laws (for example labour or environmental law).

Where human rights harms do occur, victims should have access to remedies. This can take place through State based judicial or non-judicial mechanisms, non-State grievance mechanisms, at the operational level or, alternatively, at the local, community-based level. Across these paths of remedy, the Ugandan State has a responsibility to ensure authenticity and effectiveness.

Home States also have a role to play in ensuring that their businesses' activity abroad is respectful of human rights. This can, as with the host State, be ensured through legally requiring certain standards, but may also be put into effect through guidance and / or encouraging / requiring human rights reporting.

Lastly, home States may be an appropriate, and sometimes necessary, avenue for those whose human rights have been affected to seek remedy. The paper concludes by briefly discussing these extraterritorial obligations of home States.

State Negligence vs. State Complicity

The Guiding Principles do not focus on the trend of governments sharing complicity with businesses in subjugating or abusing human rights. However, in countries where governance is weak and / or corrupt, businesses and government may act as a joined unit, with decisions of the one barely distinguishable from the other.

The subject of this paper – oil in a developing East-African State, renders this risk particularly pertinent. This paper will discuss issues such as corruption and State-business ties. However State-business complicity in human rights abuses will not be discussed. This is not to say that there is no possibility of collusion between governments and companies, or that the States discussed in this paper have human rights as a constant central priority. Rather, that this issue is beyond the scope of this report and, given the significance of the topic, it would be better addressed in research dedicated to the specific topic.

Structure of this report

This report is structured around the UN Guiding Principles on Business and Human Rights, with specific focus on State responsibility. Provisions relevant to States have been pulled out, and contextualised in Uganda's oil industry.

There are many steps that States can take to safeguard human rights against the negative effects of business activity; this report cannot be comprehensive. Rather, some of the most useful, accessible, or potentially helpful measures will be discussed. These are placed alongside measures that already are in place, and often a comparison is drawn between the ideal and the existing.

The Ugandan State is the focus of this paper. The final section provides an overview of some of the steps that the UK, France and China (the home States of the major companies present in Uganda) can take to safeguard human rights.

Information box: Key Concepts in the Guiding Principles²

Actual human rights impact: An adverse impact that has already occurred or is occurring.

Adverse human rights impact: Occurs when an action removes or reduces the ability of an individual to enjoy his or her human rights.

Due diligence:³ Due diligence is understood as a business process through which enterprises actively identify, prevent, mitigate and account for how they address and manage their potential and actual adverse human rights impacts. The process should include assessing actual and potential impacts throughout their business operations, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Due diligence implies more than just an assessment of risks for the company; the purpose is to understand and address risks and abuses that the company's activities pose to rights holders, including in its supply chain and through its other business relationships.

Gross human rights abuses: There is no uniform definition of gross human rights violations in international law, but the following practices would generally be included: genocide, slavery and slavery-like practices, summary or arbitrary executions, torture, enforced disappearances, arbitrary and prolonged detention, and systematic discrimination. Other kinds of human rights violations (including economic, social and cultural) can also count as gross violations if they are grave and systematic, for example violations taking place on a large scale or targeted at particular populations or groups.

Home State: The nationality of a given transnational corporation. Under public international law, this is generally the country in which a business has been incorporated (i.e. legally formed into an entity that is separate from its owners / shareholders) or the country from which control over the corporation's activities is primarily exercised.⁴

Host State: The country under whose territory operations of a particular business entity fall.⁵

Human rights risks: A business enterprise's human rights risks are any risks that its operations may lead to one or more adverse human rights impacts. They therefore relate to its potential human rights impact. In traditional risk assessment, risk factors in both the consequences of an event (its severity) and its probability. In the context of human rights risk, severity is the predominant factor. Probability may be relevant in helping prioritize the order in which potential impacts are addressed in some circumstances (see "severe human rights impact" below). Importantly, an enterprise's human rights risks are the risks that its operations pose to human rights. This is separate from any risks that involvement in human rights impact may pose to the enterprise, although the two are increasingly related.

Mitigation: The mitigation of adverse human rights impact refers to actions taken to reduce its extent, with any residual impact then requiring remediation. The mitigation of human rights risks refers to actions taken to reduce the likelihood of a certain adverse impact occurring.

² Unless otherwise indicated, taken from OHCHR, *The Corporate Responsibility To Respect Human Rights, An Interpretive Guide*, New York and Geneva 2012 (available at: www.ohchr.org/Documents/Issues/Business/RtRInterpretativeGuide.pdf) p.5.

³ Definition taken from van Huijstee, M, Ricco, V, and Ceresna-Chaturvedi, L, *How to use the UN Guiding Principles on Business and Human Rights in company research and advocacy: A guide for civil society organisations*, SOMO, CEDHA, and Cividep India, November 2012.

⁴ Zerk, J.A, 'Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas', *Corporate Social Responsibility Initiative Working Paper No.59*, June 2010, (www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_59_zerk.pdf), p. 13.

⁵ Authors' definition.

Potential human rights impact: An adverse impact that may occur but has not yet done so.

Prevention: The prevention of adverse human rights impact refers to actions taken to ensure such impact does not occur.

Remediation/remedy: Refer to both the processes of providing remedy for an adverse human rights impact and the substantive outcomes that can counteract, or make good, the adverse impact. These outcomes may take a range of forms, such as apologies, restitution, rehabilitation, financial or non-financial compensation, and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition.

Severe human rights impact: The commentary to the Guiding Principles defines severe human rights impact with reference to its scale, scope and irremediable character. This means that its gravity and the number of individuals that are or will be affected (for instance, from the delayed effects of environmental harm) will both be relevant considerations. "Irremediability" is the third relevant factor, used here to mean any limits on the ability to restore those affected to a situation at least the same as, or equivalent to, their situation before the adverse impact. For these purposes, financial compensation is relevant only to the extent that it can provide for such restoration.

Stakeholder/affected stakeholder: A stakeholder refers to any individual who may affect or be affected by an organisation's activities. An affected stakeholder refers here specifically to an individual whose human rights have been affected by an enterprise's operations, products or services.

Stakeholder engagement/consultation: Refers here to an ongoing process of interaction and dialogue between an enterprise and its potentially affected stakeholders that enables the enterprise to hear, understand and respond to their interests and concerns, including through collaborative approaches.

UN Guiding Principle: The Host State Duty to Protect Human Rights

Foundational Principles 1 and 2: The State Duty to Protect Human Rights

The UN Guiding Principles' first foundational principle is that,

*"States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication."*⁶

The second,

"States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations."

These foundational principles embody the core of the framework – States have the primary responsibility to ensure that businesses do not abuse human rights. States therefore breach their international legal obligations where they do not take steps to prevent, investigate, punish and redress human rights abuses by third parties.⁷

States have a variety of options to choose from in achieving this, from legislation and regulations to policies, recommendations and adjudication; from encouragement and advice to gradually requiring businesses to conduct due diligence whenever appropriate. The following section will outline these options.

Setting expectations and providing effective guidance to business enterprises

The Guiding Principles require governments to make businesses domiciled in their territory and/or jurisdiction aware of their responsibility to respect human rights.

The Guiding Principles encourage States to implement a National Action Plan on Business and Human Rights – a roadmap for the coming years. Some states have done so and some are in the consultations phase. Uganda is not one, and the Uganda Human Rights Commission have confirmed that such a plan is still some way off.⁸

The concept of business and human is perhaps most likely to enter Uganda's public discourse through the label of "CSR" or Corporate Social Responsibility. CSR is growing in recognition and importance in Uganda; in 2013, Kampala will host the country's first CSR Awards.⁹ Unfortunately, the current general understanding of CSR in Uganda can be somewhat more rooted in improving a businesses' public image, than truly engaging with human rights and environmental issues. Regardless of whether CSR is seen as a public relations or human rights exercise, its progress is limited in Uganda as it is neither encouraged nor legally required by the State.¹⁰

More precise and human rights directed than CSR are specific guidelines and guidance materials on business and human rights.¹¹ Issuing guidance both signals a baseline standard of expectation, and ensures that specific national issues are addressed. Guidance can take the form of methods or tools,

⁶ Human Rights Council (1), "Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, John Ruggie, Guiding Principles on Business and Human Rights for implementing the UN "Protect, Respect and Remedy" Framework" (21 March 2011), *UN Doc A/HRC/RES/17/31*. Para 1(A.1).

⁷ States also breach their international legal obligations when private party abuse can be attributed to them, however this will not be covered in depth in this paper.

⁸ Interview; *IPIS and Uganda Human Rights Commission*, Kampala, December 2013.

⁹ Uganda CSR Awards 2013, *Corporate Social Responsibility*, (<http://www.csrwards.ug/>).

¹⁰ Nkiko, C.N, and Katamba, D, Uganda Country Profile, *The World Guide to CSR*, Eds: Visser, W and Tolhurst, N, June 2010. N.B. This resource also provides examples of CSR requirements and encouragement in other States.

¹¹ HRC (2011), *op. cit.* (n.6) Para 3

such as how to implement human rights due diligence, or can explain human rights respect at the most fundamental level. Issuing guidance is a first step towards shaping public understanding of business responsibility, and can act as a bridge between setting standards in practice and through law.

For example, the European Commission's (EC's) *Oil and Gas Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights*¹² applies the Guiding Principles to the oil and gas sector in order to help companies "translate" respect for human rights into their own systems and company cultures. Such a guide could be produced by Uganda, for national companies and those operating in the country, and tailored to the specific country-context.

Uganda has no similar guidance to the above from the EC, however they do promote a more general standard called ISO 26000¹³ – a piece of guidance on how businesses and organizations can operate in a socially responsible way. The ISO – the International Organization for Standardisation – is the world's largest developer of voluntary International Standards.¹⁴

State agencies can also provide human rights guidance to businesses. For example, the Uganda Human Rights Commission (UHRC) could offer advice to companies on how to consider certain particularly sensitive human rights areas, such as access to land, livelihoods, and women's rights. Neither the UHRC or the Petroleum Exploration and Production Department (PEPD) of the Ministry of Energy and Mineral Development have publically released any guidance for extractive companies.¹⁵

The authors asked Uganda's three major oil companies if they had been offered details or guidelines from the Ugandan government on how to engage with business and human rights issues. Total reported that although they perceived the Ugandan authorities to be demanding, this generally related to environmental issues.¹⁶ Tullow reported that they had not been directly approached by the government regarding human rights issues.¹⁷ CNOOC Uganda simply stated that complied with the Ugandan legislative framework.¹⁸ All three companies also specified that they referred to their own and international standards and best practices.

Another way in which governments might guide businesses could be through local governance structures. For example, presence in person at oil sites could enable tailored advice with regard to how to respect local communities, operate sensitively etc. When International Alert conducted research on the dynamics of governance in the Albertine Graben, their respondents reported that they perceived the capacity of governance structures at local government levels to coordinate monitor and supervise oil activities to be inadequate.¹⁹ At the sub-county level, International Alert reports that dissatisfaction is particularly felt with regard to the level of integrity, transparency, participation, capacity and performance displayed by the leadership. Although these are civil society perceptions and might not necessarily reflect what local government has delivered to oil companies, they do suggest that there may be more that local governments could do to advise companies on site-specific issues.

In place of State guidance, a number of civil society and other actors seeking to bridge business and human rights have taken up initiatives. For example, the *Nairobi Process*, run by the *Institute of Human Rights and Business* in partnership with the *Kenya National Commission on Human Rights*, aims to embed human rights due diligence through the multi-stakeholder application of the UN Guiding Principles

¹² European Commission (authored by Shift and the Institute for Human Rights and Business), *Oil and Gas Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights*, 2013. N.B. This guidance will be discussed in more detail regarding home State responsibilities (p.46).

¹³ Uganda National Bureau of Standards, *ISO Project to Encourage the Uptake and use of the International Standards ISO 26000 on Social Responsibility (SR) in Eastern Africa*, 19 September 2012 (<http://goo.gl/RYSIDR>).

¹⁴ ISO, *ISO 26000 – Social Responsibility*, last accessed 10 December 2013 (www.iso.org/iso/home/standards/iso26000.htm).

¹⁵ Interview; *IPIS and Lynn Turyatemba, International Alert Uganda*, Telephone, March 2013.

¹⁶ Interview; *IPIS and Julie Vallat, Legal Counsel, Compliance and Social Responsibility, Total SA*. Telephone. 15 May 2013.

¹⁷ Email communication; *IPIS and Cathy Adengo, Corporate Communications Manager at Tullow Oil Uganda*, 30 May 2013.

¹⁸ "CNOOC Uganda Limited is a wholly-owned subsidiary of CNOOC Limited which complies with the 10 principles advocated by the Global Compact and fulfills its responsibility in the areas of human rights, labor rights, environmental protection and anti-corruption. CNOOC Uganda Limited conducts business through the provided and prevailing legal framework, and operates in compliance with the laws and regulations in Uganda." Email communication; *IPIS and Wei Chai, Corporate Affairs Department, CNOOC Uganda Limited*, 10 May 2013.

¹⁹ International Alert, *Governance and livelihoods in Uganda's oil-rich Albertine Graben*, March 2013.

on Business and Human Rights. The process has three strands, the second of which fulfils the Guiding Principles' call for the enablement of information sharing between businesses regarding good practice.

There are many other notable pieces of guidance for businesses, lawyers, and other players, including Social Accountability International's *Six-Step Approach to Supply Chain Implementation*,²⁰ 4AID's *Law Firms' Implementation of the Guiding Principles on Business & Human Rights*, and the components of IPIECA's *Business and Human Rights Project*²¹ amongst many others.

Civil society, industry organisations, and other political bodies have taken up the baton of providing guidance to businesses. This is no bad thing as they are well-placed to do so. However the benefit of guidance from States themselves is that not only can information be tailored – i.e. to oil players in Uganda – but inherent to States offering guidance is the clear indication of expectations that companies should to comply with best-practice human rights standards along with compliance to national laws. Should Uganda wish companies involved in its oil sector to demonstrate the highest level of respect for human rights, this would be a wise step.

Legally requiring businesses to respect human rights

To create a legal climate in which businesses feel a firm requirement to act with care, States should enforce laws that have the effect of requiring business enterprises to respect human rights²² and these laws should be periodically assessed. Relevant areas of law include non-discrimination, labour, property, privacy, anti-bribery, and environmental laws, although this is by no means exhaustive.

It is not within the scope of this paper to assess every piece of legislation or policy governing business activity, however a short overview of the key legal fields relevant to human rights and business in the oil sector is provided below.

International and Regional Human Rights Instruments and Constitutional law

Uganda is party to a number of international human rights Treaties and Covenants. These include the International Covenant on Economic, Social and Cultural Rights, The International Covenant on Civil and Political Rights, The Optional Protocol to the International Covenant on Civil and Political Rights, The International Convention on the Elimination of All Forms of Racial Discrimination, The Convention on the Elimination of All Forms of Discrimination against Women, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, The Convention on the Rights of the Child, The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts, The Abolition of Forced Labour Convention, The Employment Policy Convention, African [Banjul] Charter on Human and Peoples' Rights, Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, and the African Charter on the Rights and Welfare of the Child.²³

Uganda's Constitution lists the core human rights that should be "respected, upheld and promoted by all organs and agencies of Government and by all persons."²⁴ These constitutional rights include the right to a clean and healthy environment (art. 39), the right to education (art. 30), the right to the equal protection of the laws (art. 21), the right to freedom from torture, cruel, inhuman or degrading treatment or punishment (art. 24), the right to freedom of association (art. 29(1)(e)), the right to freedom of expression (art. 29), the right to freedom of movement (art. 29(2)), the right to just and favourable work conditions (art. 40), the right to liberty and security (art. 23), the right to life (art. 22), the right to non discrimination (art. 21), the right to own property (art. 26), the right to participate in the affairs of

²⁰ Social Accountability International and ICCO, *Implementing the UN Guiding Principles in your Supply Chain: Handbook & Toolkit*, last accessed 10 December 2013 (www.sa-intl.org/index.cfm?fuseaction=Page.ViewPage&pageId=1315).

²¹ IPIECA, *Business and Human Rights*, last accessed 10 December 2013 (www.iecea.org/topic/human-rights/business-and-human-rights-project).

²² HRC(1) (2011), *op. cit.* (n.6). Part I. Art B(3).

²³ University of Minnesota, *Ratification of International Human Rights Treaties – Uganda*, last accessed 13 November 2013, (www1.umn.edu/humanrts/research/ratification-uganda.html).

²⁴ Republic of Uganda (1), *The Constitution of the Republic of Uganda*, 1995, (Chapter 4, Para 20(2)).

government (art. 38), the right to privacy (art. 27), the right to seek and obtain redress for violations of constitutional rights (art. 50), the right to work (art. 40).

Labour laws

Labour rights violations are at the forefront of many people's perception of ways in which business harm human rights. Healthy working conditions are built upon a legislative foundation that effectively addresses all areas of labour.

The following information box offers an overview of Uganda's basic labour laws:

Information Box: Domestic Ugandan Law Concerning Labour²⁵

- **Constitutional law** - Constitution of the Republic of Uganda, 1995.
- **Labour codes, general labour and employment acts** - The Employment Act, 2006
- **Criminal law** - The Penal Code Act, 1950.
- **Freedom of association, collective bargaining and industrial relations** - The Trade Unions Act, 2006; The Labour Disputes (Arbitration and Settlement) Act, 2006.
- **Elimination of child labour, protection of children and young persons** - Children Act, 1997; Employment (Employment of Children) Regulations, 2011; National Youth Council Act; National Council for Children Act, 1996.
- **Equality of opportunity and treatment** - National Policy on HIV/AIDS and the World of Work; National Women's Council Act, 1993; Equal Opportunities Act, 2007.
- **Disabled workers** - Persons with Disabilities Act, 2006.
- **Education, vocational guidance and training** - Industrial Training Decree, 1972; Revised Education Sector Strategic Plan 2007-2015.
- **Cooperatives** - Cooperative Societies Act, 1991.
- **Wages** - Minimum Wages Board and Wages Council Act, 1957.
- **Occupational safety and health** - The Occupational Safety and Health Act, 2006.
- **Protection against particular hazards** - Atomic Energy Act, 1973.
- **Social security** (general standards) - Social Security Act, 1967.
- **Medical care and sickness benefit** - Public Health Act, 1935.
- **Employment accident and occupational disease benefit** - Workers' Compensation Act, 2000.
- **Social assistance and services** - The National Social Security Fund Act, 1985.
- **Migrant workers** - The Uganda Citizenship and Immigration Control Act, 1999; Refugees Act 2006.
- **Fishers** - Fish Act, 2000.
- **Public and civil servants** - Public Service Act, 1969.

²⁵ Taken from *International Labour Organisation*, Natlex, 'Basic labour law information,' last accessed 11 July 2013 (www.ilo.org/dyn/natlex/country_profiles.nationalLaw?p_lang=en&p_country=UGA).

In 2006 a new set of labour laws were put in place in Uganda to ensure compliance with International Labour Organisation (ILO) standards.²⁶ Despite these reforms, some areas of labour law in Uganda remain limited, notably laws to protect elderly workers, employment security, termination of employment, paid leave, and maternity protection.

However the core issues in labour law predominantly concern legal implementation rather than content. A study on the topic found that challenges in implementation included, "the inadequate facilitation to labour officers, non-recognition of labour unions, non-functioning of the industrial court, dual recognition of labour unions on the side of employers, informalization of labour and ignorance of the law by both workers and employers."²⁷

2012 estimates put the percentage of the working population engaged in casual work (i.e. not employed in permanent jobs) at 86%. Commentators have suggested that since the global financial crisis, employers have been able to cut costs by using agency, short-contract, and temporary workers.²⁸ Opportunities to unionise are therefore essential in Uganda, but structure

The Uganda Labour Resource Centre (ULRC) and Friedrich Ebert Stiftung (FES) made practical suggestions to address the above-mentioned issues in a May 2011 report entitled *Baseline Survey on the Implementation of New Labour Laws in Uganda: A Case Study Of Kampala, Wakiso, Jinja, Gulu and Mbarara Districts*.²⁹ The Ministry of Gender, Labour and Social Development is advised to appoint more labour officers to cover all of Uganda's districts. The ULRC-FES report also recommended centralising labour administration for the sake of efficiency and even deployment of officers.³⁰ At the time that these recommendations were made, the report expressed concern that the Industrial Court was not operational; at the time of publishing this report this was still the case.³¹

The 2011 report also called for the compilation of labour regulations to guide labour unions away from enabling "dual recognition", whereby employees are members of more than one union in the same sector.³² Strengthening Uganda's Occupational Health and Safety Department was also called for as an urgent matter, particularly with reference to "the numerous occurrences of occupational accidents and unhealthy working environment in the construction and commercial agricultural sectors respectively."³³ Given that the oil sector will require intensive construction and similar work, this particular recommendation is particularly pertinent.

The Guiding Principles place a strong emphasis on enforcement of standards that require businesses to respect human rights. In the case of labour rights, although businesses in the oil industry have a framework to adhere to, Uganda will not adequately fulfil its duty to protect if it does not effectively ensure adherence to these standards.

²⁶ Friedrich Ebert Stiftung and Uganda Labour Resource Centre, *Baseline Survey on the Implementation of New Labour Laws in Uganda: A Case Study Of Kampala, Wakiso, JiJa, Gulu and Mbarara Districts*, May 2011 (www.fes-uganda.org/media/documents/Labour_Study_2011.pdf) p.19.

²⁷ *Ibid.*

²⁸ Akello J, 'Uganda: Investors Reaping From Casual Jobs', *The Independent via allAfrica*, last updated 15 November 2012 (allafrica.com/stories/201211160076.html).

²⁹ FES and ULRC (2011), *op. cit.* (n.26).

³⁰ FES and ULRC (2011), *op. cit.* (n.26). p.51

³¹ International Labour Organisation, *LAB/ADMIN Uganda*, last updated 4 March 2013, (www.ilo.org/labadmin/info/WCMS_209370/lang-en/index.htm)

³² FES and ULRC (2011), *op. cit.* (n.26). p.52.

³³ FES and ULRC (2011), *op. cit.* (n.26) p.53.

Environmental law

Uganda has a number of environmental laws and regulations in place that are relevant to the oil sector. These include the following:

Information Box: Domestic Ugandan Law Concerning the Environment³⁴

- The National Environment (Audit) Regulations, 2009.
- The National Environment (Minimum Standards For Management Of Soil Quality) Regulations, 2001.
- The National Environment (Minimum Standards for Discharge of Effluents into Water or Land) Regulations, 1999.
- The National Environment (Access to Genetic Resources and Benefit Sharing Regulations 2005.
- The National Environment (Wetlands, Riverbanks and Lakeshores Management) Regulations, 2000.
- The National Environment (Noise Standards and Control) Regulations, 2003.
- The National Environment Impact Assessment Regulations, 1998.
- The National Environment Act, 1998.
- The National Environment Water Act, 1997.
- The National Environment Mining Act, 2003.
- The National Environment Forestry and Tree Planting Act, 20003.
- The National Environment Waste Management Regulation, 1998.
- The National Environment Ozone Depletion and Substances Products Regulations, 2001.
- The National Environment Hilly and Mountainous Areas Regulations, 2000.

Uganda's National Environmental Impact Assessment (EIA) Regulations are particularly relevant to the business and human rights conversation for a number of reasons. Firstly, the human right to a healthy environment has been widely recognised³⁵ and impact assessments offer a means by which to identify how the environment could be at risk. This is particularly important in the oil industry, where the environment can be heavily affected.

Secondly, in the absence of a legal requirement upon companies to conduct a social impact assessment (as is the case in Uganda)³⁶, EIAs are often a key avenue for voicing local social concerns. Project briefs, environmental impact review reports, environmental impact evaluation reports, environmental impact statements, terms of reference, public comments, reports of the presiding officer at a public hearing, or any other information submitted to the Executive Director or the Technical Committee of the National Environment Management Authority (NEMA) are, legally speaking, public documents.³⁷ Details of

³⁴ National Environment Management Authority (NEMA), 'Environmental Laws of Uganda,' accessed 2 July 2013, (www.nema-ug.org/environment_regulations.php).

³⁵ For example under Article 24 of the African Charter on Human and Peoples' Rights, 27 June 1981, *OAU DocCAB/LEG/67/3 rev. 5*, 21 I.L.M. 58.

³⁶ Akello C.E, Environmental Regulation in Uganda: Successes and Challenges, 3(1) *Law, Environment and Development Journal* (2007), p.20.

³⁷ Part VII, Art 29 of Uganda's Environmental Impact Assessment Regulation states that, "(1) Subject to article 41 of the Constitution and subsection (3) of section 85 of the Act, any project brief, environmental impact review report, environmental impact evaluation report, environmental impact statement, terms of reference, public comments, report of the presiding officer at a public hearing or any other information submitted to the Executive Director or the Technical

Environmental Impact Statements should be open to public comment³⁸ and, at the discretion of the Executive Director of NEMA, public hearings can be held.³⁹

Uganda's EIA process has come under fire, both generally and with regards to the Uganda's (Albertine Graben) oil exploration and production area. Firstly, as oil exploration activities are subject to EIAs on a case-by-case basis - with each exploration well, for example, needing an EIA – no comprehensive environmental and social impact study in the Albertine Graben has yet been completed.⁴⁰

Secondly, some EIA's are criticised for being sub-standard and ethically compromised, as they are conducted by private practitioners on behalf of project developers.

Achilles Byaruhanga, the Executive Director of the conservation NGO *Nature Uganda* has claimed, "The EIA experts dance to the tune of the developers who pay them. They fear they will lose their contracts if they do the right thing, so in the end the quality is compromised."⁴¹ Commentators have also highlighted a shortage of EIA experts in Uganda.

Manpower within NEMA is reportedly also too low to handle the influx of EIAs; the result can be that the process is evaded. The Director of an environmental consultancy is quoted as saying in 2012 that he had been waiting three years for his reports to be processed rather than the legally prescribed three months, "NEMA takes forever to approve or disapprove reports. If a developer waits for this long, they may lose business or go bankrupt. So there are many developers dodging the mandatory EIA process."⁴² The same Director also alleged that in a 2012 meeting with NEMA, he learned that the Agency had 500 EIAs under review.⁴³

Moreover, there are significant exceptions to Uganda's environmental protection, for example, the permissibility of gas flaring.⁴⁴ Flaring occurs when the gas associated with oil production is burned. Flaring has primarily been criticised when oil companies do not or cannot commoditise the gas (for technical or financial justifications), and subsequently flare continuously. The practice can lead to severe health problems, environmental degradation, local toxic rain, and high levels of carbon emissions. The Guardian has reported that gas flaring in Nigeria is regarded as the biggest source of CO₂ [carbon dioxide] emissions in sub-Saharan Africa.⁴⁵



The view from Butiaba Escarpment looking west towards Lake Albert. Copyright: Sarah McCans, 2006 Under a Creative Commons Licence. Please see: <http://creativecommons.org/licenses/by/2.0/legalcode>

Committee under these regulations shall be public documents." And "(2) Any person who desires to consult the documents described in sub-regulation (1) of this regulation shall, subject to section 85 of the Act, be granted access by the Authority on such terms and conditions as the Authority considers necessary." Notably, Art 29 permits developers to claim that any such information is proprietary, upon which the Executive Director of NEMA can take adequate precautions to prevent disclosure of such information. Republic of Uganda, The Environmental Impact Assessment Regulation, S.I. No. 13/1998, (nema-ug.org/regulations/eia_regulations.pdf).

³⁸ *Ibid.* Art 19.

³⁹ *Ibid.* Art. 21 and 22.

⁴⁰ Nalubega F, 'Uganda's Environmental Impact Assessment process under fire', *Oil in Uganda*, last updated 13 September 2012 (www.oilinuganda.org/features/environment/ugandas-environmental-impact-assessment-process-under-fire.html).

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ Macalister T, 'Tullow Oil given licence to flare Ugandan gas', *The Guardian*, last updated 16 February 2010 (www.guardian.co.uk/business/2010/feb/16/tullow-oil-uganda-agreement).

⁴⁵ *Ibid.*

Uganda's Petroleum (Exploration, Development and Production) Act permits gas flaring:⁴⁶ "A licensee shall not flare or vent petroleum in excess of the quantities needed for normal operational safety without the approval of the Minister on the advice of the Authority." Normal operational safety - and therefore the level at which flaring becomes excessive - is not defined in the Act, and hence is open to interpretation by companies.

Uganda's Petroleum Exploration and Production Department (PEPD) has commented on gas flaring that has already occurred in Uganda:

In Uganda, flaring has undergone transformation starting from the first burner that was used at Mputa 1. This first technology used was rejected by Government as it caused huge environmental challenges. The technology progressed to use of an ever green burner which is environmentally friendly. PEPD has received recognition from Schlumberger for using an energy efficient burner and also from NEMA for Environmental Protection. Currently, flaring during well testing has stopped and the crude oil is instead stored. Government plans to sell the crude from well testing to factories for generation of power and therefore there is no flaring during current well testing operations.⁴⁷

Although this limits flaring at present, it does not preclude it in future. This is an area of environmental legislation that warrants serious attention. However, due to contractual obligations that Uganda has entered into with oil companies, prohibiting gas flaring at this point will be difficult for Uganda's legislature.

Other progressions in environmental protection from oil-related activities have been more constructive. For example NEMA has drafted a contingency plan to avoid oil spillage alongside detection mechanisms and a quick alert system in case of a problem. NEMA has stated that the plan will outline roles and responsibilities for each stakeholder from the village level up.⁴⁸

Whilst there is notable regulatory coverage of environmental protection issues in Ugandan law, lack of enforcement, delays, and understaffing are barriers to the effective realisation of these standards. For example, pollution control is well regulated under certain provisions in Uganda's new Oil Acts⁴⁹ and the National Environment Act⁵⁰. Yet, there are reports that communities are already affected by the strong odours from mud pits that are dug during oil exploration.⁵¹

⁴⁶ Republic of Uganda (2), *Petroleum (Exploration, Development and Act 3 Production) Act, 4 April 2013*, ([www.petroleum.go.ug/uploads/Petroleum%20\(EDP\)%20Act%202013.pdf](http://www.petroleum.go.ug/uploads/Petroleum%20(EDP)%20Act%202013.pdf)), Section 100.

⁴⁷ *Petroleum Exploration and Production Department of the Ministry of Energy and Mineral Development*, 'Common Frequently Asked Questions' accessed 10 April 2013 (www.petroleum.go.ug/page.php?k=faqs).

⁴⁸ Kagolo F, 'NEMA drafts oil spill contingency plan', *New Vision Uganda*, last updated 22 April 2013 (www.newvision.co.ug/news/641882-nema-drafts-oil-spill-contingency-plan.html).

⁴⁹ See Republic of Uganda, *Petroleum (Exploration, Development and Act 3 Production) Act, 2013*, in particular: Section 3 "Compliance with environmental principles", (1) "A licensee and any other person who exercises or performs functions, duties or powers under this Act in relation to petroleum activities shall comply with environmental principles and safeguards prescribed by the National Environment Management Act and other applicable laws," Section 88(2), "a licensee shall take all reasonable steps necessary to secure the safety, health, environment and welfare of personnel engaged in petroleum activities in the licence area including" (for example) (a) "controlling the flow, and preventing the waste or discharge, into the surrounding environment, of petroleum, gas which is not petroleum or water," and (f) "preventing the pollution of any water well, spring, stream, river, lake or reservoir by the escape of petroleum, water, drilling fluid, chemical additive, gas not being petroleum or any other waste product or effluent."

⁵⁰ See Republic of Uganda, *The National Environmental Act, Cap 153, 1995*, in particular: (noting that the Act defines "pollutant" as "any substance whether liquid, solid or gaseous which directly or indirectly - (i) alters the quality of any segment or element of the receiving environment so as to affect any beneficial use adversely; or (ii) is hazardous or potentially hazardous to health, and objectionable odours, radioactivity, noise, temperature change or physical, chemical or biological change to any segment or element of the environment) Section 100: "Offences relating to pollution: Any person who - (a) pollutes the environment contrary to a condition contained in any pollution licence under section 61; or (b) discharges any pollutant into the environment contrary to Part VIII of this Act, commits an offence and is liable on conviction to imprisonment for a term of not less than eighteen months or to a fine of not less than one hundred and eighty thousand shillings and not more than eighteen million shillings or to both."

⁵¹ Kasimbazi E, *Legal and Environmental Dimensions of Oil Exploration in Uganda*, Presentation, Faculty of Law, Makerere University, Kampala, Uganda (<http://goo.gl/8Ly6h>).

Land ownership

Laws governing land ownership have a profound ability to regulate businesses' human rights impacts. Removing Ugandan citizens from their land, rehousing them, and compensating them adequately has already proved controversial in the oil-producing areas (see Paper One of this series - *Uganda's oil sector and potential threats to human rights* - for a more detailed explanation of the issues associated with business and land⁵²). Much of this land has, or will be, bought up by private developers, including international oil and service companies. It is vital that Uganda's laws protect their citizens' land rights and ensure that any changes of ownership or location are just.

Businesses report that land deals in Uganda are difficult processes and that there are problems verifying land ownership.⁵³ Commentators have explained, "The majority of Ugandans perceive ownership of land in the "traditional African sense," according to a national survey where 75% of respondents claimed they owned land, although 95% of Ugandans do not have land titles (Ministry of Lands, Housing and Urban Development, 2011)."⁵⁴ This contrasts with an increasing government lean towards individualisation of land, which confers permanent use rights to individuals.⁵⁵ Crucially, this enables the transfer or sale of land, something that the Government likely perceives as a necessity for economic development.

The effect of land-claim disagreements and mishandling is already palpable, both through bought-up land, and through forced relocation. In Buliisa District, conflicts over land ownership have escalated in recent years. Allegations of police detention and beatings of local landowners are increasingly common, as land is bought up, either fraudulently or under a cloud of misunderstanding, and sold onto the major oil companies or other developers.⁵⁶

In addition, the construction of Uganda's oil refinery will officially displace 7,118 people,⁵⁷ but unofficial figures estimate much higher, at around 30,000 people.⁵⁸ Such displacement takes place in a country where land rights are emotive, a source of conflict, and highly politicised. For example, at present, over 90% of domestic disputes in Uganda relate to land.⁵⁹

Ownership of land is affirmed in Uganda's Constitution (Section 237(1)), which states that "Land in Uganda belongs to the citizens of Uganda...in accordance with the land tenure systems provided for in this Constitution."⁶⁰ The two key Acts governing land are The Land Act of 1998⁶¹ (amended 2010⁶²) and the Land Acquisition Act of 1965⁶³.

The Investment Code Act of 1991 (revised 2000) is also relevant to the acquirement of land by investors.⁶⁴ Investors can gain ownership over land through direct negotiation with private landowners, or through the acquisition of government land held by various agencies, including the District Land Boards, the Uganda Land Commission, or the Uganda Investment Authority.⁶⁵ These laws limit the Ugandan

⁵² Wass G and Musiime C, *Business, Human Rights, and Uganda's Oil. Part I: Uganda's oil sector and potential threats to human rights*, IPIS Research and ActionAid International Uganda, (www.ipisresearch.be/download.php?id=413).

⁵³ World Bank, 2004, Uganda - Second Private Sector Competitiveness Project. Washington D.C., *The World Bank*. accessed 5 April 2012, (documents.worldbank.org/curated/en/2004/07/5038638/uganda-second-private-sectorcompetitiveness-project).

⁵⁴ Owaraga N, 'Conflict in Uganda's Land Tenure System', *Africa Initiative, Africa Portal*, last updated 14 May 2012, (www.africaportal.org/articles/2012/05/14/conflict-uganda%E2%80%99s-land-tenure-system).

⁵⁵ *Ibid.*

⁵⁶ Oil in Uganda, *Oil in Uganda Newsletter*, Issue 2, August 2012 ([www.oilinuganda.org/wp-content/plugins/downloads-manager/upload/OIL%20IN%20UGANDA%20ISSUE%202%20\(AUGUST%202012\).pdf](http://www.oilinuganda.org/wp-content/plugins/downloads-manager/upload/OIL%20IN%20UGANDA%20ISSUE%202%20(AUGUST%202012).pdf)) p.3.

⁵⁷ Ongode, B, Compensation of refinery residents commences Oil in Uganda, last updated 25 October 2013 (www.oilinuganda.org/features/land/compensation-of-refinery-residents-commences.html).

⁵⁸ Kasoma A, 'Oil Refinery to Displace 30000', *The Independent*, last updated 4 June 2012, (www.independent.co.ug/business/business-news/5859-oil-refinery-to-displace-30000).

⁵⁹ Owaraga N (2012), *op. cit.* (n.54).

⁶⁰ Republic of Uganda (1), *op.cit.* (n.24). N.B. These tenure systems are: customary, freehold, mailo and leasehold.

⁶¹ Republic of Uganda (2), *Land Act*, 1998.

⁶² Republic of Uganda (3), *Land (Amendment) Act*, 6 January 2010.

⁶³ Republic of Uganda (4), *Land Acquisition Act*, 1965.

⁶⁴ Republic of Uganda (5), *Investment Code*, 1991. Republic of Uganda, *Investment Code Act, Cap 92 Revised Edition*, 2000.

⁶⁵ Stickler M.M, 'Governance of Large-Scale Land Acquisitions in Uganda: The role of the Uganda Investment Authority', (Paper presented at the International Conference on Global Land Grabbing II October 17-19, 2012), *Land Deal Politics Initiative* (available at www.cornell-landproject.org/download/landgrab2012papers/stickler.pdf), p.10.

government's land acquisition: if used or lived-upon, acquisition must be within reasonable limits and in the interest of the public good.

However, the notion of "public good" is changing with the global desire to attract investment. The Institute of Human Rights and Business have commented that:

"The State has the right to take over land for public purpose. While states have used this doctrine usually to build highways, power plants, irrigation projects, and other major infrastructure development projects, lately states have begun acquiring land for commercial ventures [...] There is no clarity and alignment about the idea of "public good" from a human rights perspective [...] Are there ways to distinguish legitimate activities for public good versus purely economic activities? What constitutes the public?"⁶⁶

There are hopes that Uganda's National Land Policy of 2011⁶⁷ will lead to significant land reforms in the country, bringing clarity on how and whether the government can acquire land for investments, and the specificities of ownership. Yet this appears not to have been the case. There is still widespread consternation about the way in which the Ugandan government acquires land from its people by way of the Land Acquisition Act.⁶⁸ It does so using the justification of public good, yet such acquisition is often for investors to buy, sell or lease the land.⁶⁹

If the government under the reasoning of "public good" acquires land, legally, compensation must be given. According to the Ministry of Lands, Housing and Urban Development, the Ministry makes calculations about compensation owed to local communities affected by oil extraction in the Albertine Graben using figures from District Land Boards. However, this process is then handed over to the Ministry



A Ugandan citizen stands on the two acres of land he has left to make a living from. From a series by Friends of the Earth on Land Grabbing in Uganda. Copyright: Friends of the Earth, 2011, Creative Commons. Under a Creative Commons Licence. (Please see: <http://creativecommons.org/licenses/by-nc-nd/2.0/legalcode>).

⁶⁶ Institute of Human Rights and Business, *Preventing Conflicts Over Land: Exploring the role of business and the value of human rights approaches*, Draft Position Paper, November 2009, (http://www.ihrb.org/pdf/Preventing_Conflicts_over_Land-Draft_Position_Paper_Nov09.pdf), p.13.

⁶⁷ 'The Uganda National Land Policy', March 2011, *Ministry Of Lands, Housing And Urban Development*.

⁶⁸ Republic of Uganda (4), *op.cit.* (n.63).

⁶⁹ *Ibid.*

of Energy and the private sector to implement.⁷⁰ It can then be unclear to relocated communities who could be to blame for perceived unfairness of compensation.

For example, Uganda's Bujagali Interconnection Project, completed in 2012 at a cost of \$230 million, saw conflict between the company workers and the local populations; the latter com claimed that work was being started before adequate compensation had been provided to them. The former inhabitants of the project site also claimed that relocation plans were inadequate and that they were being "treated like refugees" who were being moved to poor quality housing in remote rural areas without running water or electricity.⁷¹

Inadequate consultation is also cited as an ongoing issue, for example in the Kalangala oil palm project and the hydropower project in Kiryandongo district. Neumann Kaffee Gruppe, a German company run the Kaweri Coffee Plantation in Mubende district, have come under domestic and international fire over the accusation that 2,000 people were forcibly evicted and denied adequate compensation.⁷²

Essentially, although Uganda's legislation can offer some considerable protection to Ugandans against narrow investment interests, this protection effort is not necessarily reflected in practice. Moreover, because Uganda's policy framework is somewhat incoherent, it is not clear whether these laws provide "necessary human rights coverage in light of evolving circumstances", as recommended by the UNGPs.⁷³ Indeed, the Guiding Principles go on to emphasise that "greater clarity in some areas of law and policy, such as those governing access to land, including entitlements in relation to ownership or use of land, is often necessary to protect both rights-holders and business enterprises."⁷⁴ This certainly appears to be the case in Uganda.

Transparency, freedom of information, and anti-corruption measures

Access to information and transparency measures reduce the risk of corruption, whilst also being linked to a number of positive outcomes, including stability and lack of autocracy. The necessity for transparency spans many areas of public life: from governance to justice, finance to State contracts. Yet corruption in Uganda remains rife.⁷⁵ International donors have cut off Uganda in the past after billions of Ugandan Shillings were found in the Office of the Prime Minister.⁷⁶ Uganda's new oil laws (to be discussed on p.29) have consolidated fear that the oil industry will follow in the trend of government opacity and foster an environment for corruption due to a lack of Parliamentary oversight over revenues.

Academics Kathman and Shannon have studied how oil extraction could impact domestic instability in Uganda under two juxtaposing scenarios: an opaque government, and a transparent one. The authors used an existing statistical model to conduct simulations for Uganda's "future realities" – notably increasing levels of oil production, and changes in Uganda's form and quality of governance.

Kathman and Shannon start from the present – no oil production in Uganda, which is an anocracy (i.e. a country that is neither fully democratic nor autocratic) with moderate corruption.⁷⁷ They also start with the estimate that Uganda's current likelihood of experiencing new civil unrest is 8.41%.

The two lines in the graph below chart the likelihood of civil unrest in Uganda, should the country become amongst the top fifty, forty, thirty etc. oil producing countries in the world. The grey line's trajectory is determined by increasing Uganda's hypothetical level of political corruption and authoritarianism to "reflect the transformative process indicated by the resource curse theory,"⁷⁸ – i.e. if President Museveni

⁷⁰ Interview, *IPIS and Ref Dennis Obbo, Ministry of Lands and Urban Development*, Kampala, Uganda, February 2013.

⁷¹ Balemesa T, 'Uganda: Law of the Land - Land Grabs Threaten Local Livelihoods in Uganda', in *Think Africa Press via allAfrica*, last updated on 28 November 2012, (allafrica.com/stories/201211290864.html).

⁷² *Ibid.*

⁷³ HRC(1) (2011), *op.cit.* (n.6), Part I. Article B(3).

⁷⁴ HRC(1) (2011), *op.cit.* (n.6), Part I. Article B(3).

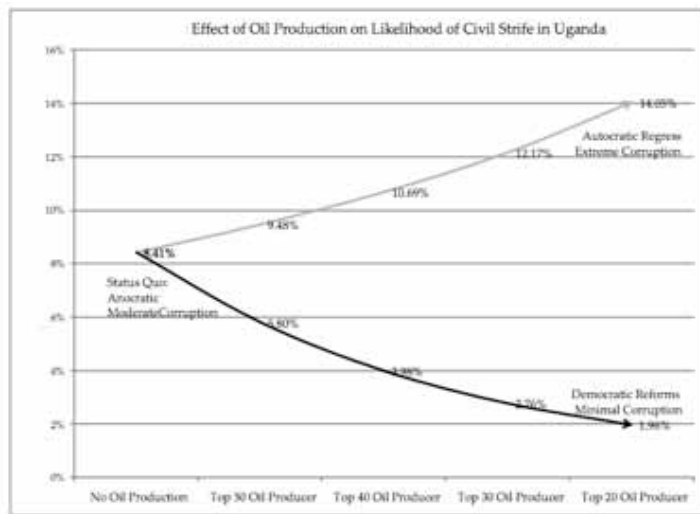
⁷⁵ Ssekika E, "10 reasons corruption persists in Uganda", *The Observer*, last updated 12 December 2012, (www.observer.ug/index.php?option=com_content&task=view&id=22598&Itemid=114).

⁷⁶ Tran M, 'UK suspends aid to Uganda as concern grows over misuse of funds', *The Guardian*, last updated 16 November 2012, (www.theguardian.com/global-development/2012/nov/16/uk-suspends-aid-uganda-misuse).

⁷⁷ Kathman, J and Shannon, M, Oil Extraction and the Potential for Domestic Instability in Uganda, *African Studies Quarterly*, 12(3), Summer 2011, p.33.

⁷⁸ *Ibid.* p.33.

follows in the footsteps of other “resource-cursed” countries. The black line charts the opposite – “reforms are implemented [to] make the political system increasingly transparent, fight corruption, and facilitate a transition to open, competitive, and representative democracy.”⁷⁹ Under these conditions, the likelihood of civil conflict in Uganda, if it were to be a top 20 world oil producer, differs from 1.96% to 14.04%.



Given projections like these, the importance of transparency is considerable. Ensuring ethical business practices in unstable States can be very complicated. Nigeria’s history demonstrates that political and civil violence can become inextricably linked with business activity.

Uganda has an Inspectorate of the Government, an independent institution charged with the responsibility of “eliminating corruption, abuse of authority and of public office.”⁸⁰ Established under the Constitution and the Inspectorate of Government (IGG) Act of 2002,⁸¹ the Inspectorate’s functions

and powers include: investigating (or causing investigation – i.e. initiating an investigation / instructing other bodies such as the police to investigate a case); arresting (or causing arrest); prosecuting (or causing prosecution); making orders and giving directions during investigations; accessing and searching, entering and inspecting premises or property; and searching a person or bank account or safe deposit box.⁸²

Uganda’s Anti Corruption Act was passed in 2009⁸³ and the country now has an Anti Corruption Court.⁸⁴ 2010 saw the introduction of The Whistleblowers Protection Act, and the country is coming to the end of a 2008-2013 National Strategy to Fight Corruption and Rebuild Ethics and Integrity in Uganda.⁸⁵ The Budget Act of 2001⁸⁶ and the Public Finance and Accountability Act of 2003⁸⁷ also speak strongly against corruption. The Office of the Auditor General under the Constitution, National Audit Act and the Public Finance and Accountability Act is mandated to audit and report on the public accounts of Uganda.⁸⁸

In 2005, Uganda’s Access to Information Act was passed.⁸⁹ The Act contains provisions for Ugandan citizens to request government-held information and provides channels for the government to respond. However, the Act has also been criticised for not meeting the spirit of a strong right to information, as per Uganda’s Constitution. This is due to provisions in the Act that make access to information costly and difficult in practice.⁹⁰

Regarding the oil industry, Section 27 of the Act allows Government Information Officers to refuse requests for information if they contain: (a) proprietary information; (b) scientific or technical information,

⁷⁹ *Ibid.* p.34.

⁸⁰ The Inspectorate of Government, *Mandate of the Inspectorate of Government*, last accessed 29 October 2013.

⁸¹ Republic of Uganda, Constitution and the Inspectorate of Government (IGG) Act, 2002.

⁸² IGG, *op.cit.* (n.80).

⁸³ The Republic of Uganda (8), *Anti Corruption Act*, 25 August 2009.

⁸⁴ *Uganda Radio Network*, “Anti corruption court starts work in December”, last updated 4 November 2011, (direct.ugandaradionetwork.com/a/story.php?s=18726&PHPSESSID=92bc5699bd245ae13af5319885b6b177).

⁸⁵ The Republic of Uganda (9), *National Strategy to Fight Corruption and Rebuild Ethics and Integrity In Uganda 2008-2013*.

⁸⁶ Kuteesa F, Magona I, Wanyera M, and Wokadala J, “Uganda: A Decade of Budget Reform and Poverty Reduction”, *OECD Journal on Budgeting*, Volume 6(2), 2006, (www.oecd.org/gov/budgeting/43470207.pdf).

⁸⁷ The Republic of Uganda, *The Public Finance and Accountability Act*, 2003.

⁸⁸ Office of the Auditor General (OAG), *Legal Mandate*, last accessed 10 December 2013, (www.oag.go.ug/index.php?option=com_content&view=article&id=26&Itemid=24).

⁸⁹ Republic of Uganda (6), *The Access to Information Act*, 2005.

⁹⁰ Larsen G, Excell C and Veit P.G, Uganda’s Access to Information Regulations: Another Bump in the Road to Transparency, *World Resources Institute*, 30 June 2011.

the disclosure of which is likely to cause harm to the interests or proper functioning of the public body; or (c) information supplied in confidence by a third party, the disclosure of which could reasonably be expected:- (i) to put that third party at a disadvantage in contractual or commercial negotiations, or (ii) to prejudice that third party in commercial competition. It is often this last provision that is cited as a justification for not revealing contracts and revenues; government officials can refer to the possibility of a company being at disadvantage if a certain contract is disclosed.⁹¹ The PEPD have elaborated on this:

“Access to information on oil is limited in order to safeguard the interests of Government and the companies. Documents such as PSAs are kept confidential to avoid malicious intentions of certain groups that may use the information for their own gain against the country’s interests. The PSAs [that the] Government [has] signed have all been tabled before Parliament and therefore accessible by the Members of Parliament. The PSAs have sensitive financial information that may harm a companies’ financial status and thus need to be handled in a responsible manner. PSAs all over the world are confidential in order to maintain competitiveness.”⁹²

Yet, worldwide, oil contracts *are* increasingly being made public, and there is a strong civil and political push to forward this trend. Open Oil, who collaborated with experts to produce *Oil Contracts: How to Read and Understand them*, explored contracts from Afghanistan, Azerbaijan, Brazil, Ghana, Indonesia, Iraq, Libya and Timor Leste, all of which were in the public domain.⁹³ Arguments against opaque contracts are strong:

Regarding the claim State often use that contracts forbid public release, the book states that, in most contracts, the wording does not stipulate that contracts cannot be made public, but merely that information attached to oil production, such as seismic data and analysis from drilling should not be disclosed. The authors of the book also highlight the unnecessary step of keeping contracts hidden as going against the grain of the emerging norm of freedom of information.



Citizens from Uganda’s oil region are prevented from entering the Parliamentary debate on oil. Copyright: ActionAid, 2012

⁹¹ Interview, *IPIS and Turyatamba L.K, International Alert Uganda*, Telephone, 8 April 2013.

⁹² PEPD, *op.cit.* (n.47).

⁹³ *OpenOil*, “Oil Contracts: How to Read and Understand them” November 2012 (openoil.net/2012/11/06/oil-contracts-how-to-read-and-understand-them-out-now).

Referring to another common claim, that publishing contracts harms commercial interests, the book points out that many contracts are already published on high cost commercial databases. From these, competitors often have easy access to the information that could allegedly “harm commercial interests”.

Commentators also highlight structural barriers to information, such as a lack of basic technical equipment and communication systems (computers, adequate internet connection, etc.) within public bodies. This leads to difficulties posting information. Language barriers form another hurdle. For example, if written only in English, EIAs might be inaccessible to affected communities. Moreover, a “culture of secrecy” amongst civil servants is highlighted by other commentators as a main barrier, with officials reluctant to disclose information related to government activities.

A key way in which the State could have ensured that good transparency standards are met is through the EITI – the Extractive Industries Transparency Initiative.

Information Box: EITI – the Extractive Industries Transparency Initiative

The EITI is a coalition initiative of governments, companies, civil society groups, investors and international organisations that aims to ensure openness on financial transactions in the extractive industry. Countries implement the EITI Standard to ensure full disclosure of taxes and other payments made by producing oil, gas and mining companies. These payments are disclosed in an annual EITI Report. This report allows citizens to see for themselves how much their government is receiving from their country’s natural resources.

When a country signs up to the EITI, they commit to a “robust yet flexible” methodology, known as the EITI Standard. Countries can be, and are, suspended from the initiative if the criteria are not met. For example, Uganda’s neighbour, the Democratic Republic of Congo, has been suspended for a year for not meeting all requirements in the EITI standard, most notably, requirements for full disclosure and assurance of the reliability of figures.⁹⁴

Uganda has shown some interest in the EITI. In its 2008 Oil and Gas Policy,⁹⁵ specifically in Objectives No. 6 and No. 7, references to the EITI range from “participating in the processes of the EITI”⁹⁶ to “ensuring development and harmonization of accounting standards in oil and gas activities including implementing principles of the Extractive Industries Transparency Initiative (EITI).”⁹⁷ Yet the government has left mention of the EITI out of the country’s oil laws. Global Witness have encouraged Uganda to become an EITI candidate country as soon as possible, and amend the Public Finance Bill to require companies to publish the payments they make to the GOU and associated entities such as the National Oil Company.⁹⁸

The stronger Uganda acts on transparency, freedom of information, and anti-corruption measures, the more likely it is to leave behind the corruption and lack of accountability that has affected its past. Actions should include compliance with initiatives such as the EITI, and the strengthening of anti-corruption measures, specifically by allowing greater parliamentary oversight and scrutiny of oil transactions and revenues.

Periodic assessment of legislation and policy

It is only through a systematic review of a relevant law and policy that gaps can be located, and amendments made. Uganda has processes in place for this - the Directorate of the First Parliamentary Counsel in Uganda’s Ministry of Justice and Constitutional Affairs and the Uganda Law Reform Commission

⁹⁴ Kavanagh M.J, ‘Congo Suspended From Mining-Transparency Initiative for 1 Year’, *Bloomberg News*, last updated 18 April 2013 (www.businessweek.com/news/2013-04-18/congo-suspended-from-mining-transparency-initiative-for-1-year).

⁹⁵ Ministry Of Energy And Mineral Development, *National Oil and Gas Policy for Uganda*, February 2008.

⁹⁶ *Ibid.* p. 26 Action (iii).

⁹⁷ *Ibid.* p. 48 (b) (xiv).

⁹⁸ Access Info, *Access Info and ECCJ call for a strong EU position on corporate non financial reporting*, last updated 18 July 2013 (www.access-info.org/en/business-transparency/470-corporate-non-financial-reporting)

ensure that laws are revised, Bills drafted for enactment, and current laws amended. However, during a review of Uganda's judicial system the World Bank reported that these processes can be extremely slow.⁹⁹ The same report also found that there was a "great need for human rights training for most sector institutions, and efforts to provide this training were fragmented and irregular."¹⁰⁰

Moreover, countries are beginning to design and release National Action Plans on Business and Human Rights, which, amongst other aims, can involve a review of these areas of law. Uganda does not seem to have plans for this. Uganda's National Action Plan on Human Rights is currently in the consultation phase.¹⁰¹ However, descriptions of the action plan do not seem to include business and human rights.

There are a number of international guidelines that could help Uganda to review its laws to ensure that natural resource exploitation fulfils its responsibility to encourage positive outcomes. International Alert's *Oil and Gas in Uganda: A Legislator's Guide* has outlined some of these:¹⁰² *EITI Guide for Legislators: How to Support and Strengthen Resource Transparency*;¹⁰³ *Natural Resource Charter*;¹⁰⁴ *National Democratic Institute (NDI) report, Transparency and Accountability in Africa's Extractives: The Role of the Legislature*;¹⁰⁵ and *World Bank Institute's (WBI) Parliamentary Strengthening Learning Program*.¹⁰⁶

The role of NHRIs in advising States on legislation, policy, and enforcement

In Uganda, the national human rights institution (NHRI) is the Ugandan Human Rights Commission (UHRC), mandated by Uganda's Constitution.¹⁰⁷ The Guiding Principles stress that NHRIs "have an important role to play in helping States identify whether relevant laws are aligned with their human rights obligations and are being effectively enforced."¹⁰⁸

The UHRC's functions include conducting investigations, making recommendations to Parliament to facilitate legal reform, raising awareness of and educating Ugandans on human right provisions, and monitoring the government's compliance with international obligations.¹⁰⁹ The Commission operates independently¹¹⁰ and publishes periodical reports on its findings.¹¹¹

The UHRC offers an excellent link between business, government and civil society. It handles issues with and from all of these parties, whilst representing Uganda at the key business and human rights forums, including the Roundtable of National Human Rights Institutions on the Issue of Business and Human Rights and the Consultative Forum on Business and Human Rights.

Crucially, the UHRC can conduct research and feed back its expertise to contribution to legislative reforms that strengthen respect for human rights by businesses in Uganda. The UHRC states that it is,

"mandated to review bills tabled before Parliament for compliance with international, regional and national human rights standards. Some of the bills that have been reviewed by the Commission for compliance with human rights standards ha[ve a] direct or indirect implication on business and human rights. They include the Equal Opportunities Bill; the Anti-Corruption Bill; the Mortgage Bill; and the Land Amendment Bill. After review of the bills, the UHRC followed up

⁹⁹ *Legal Vice Presidency: The World Bank, "Uganda Legal and Judicial Sector Study Report", July 2009, (openknowledge.worldbank.org/bitstream/handle/10986/3088/497010ESWOP11010Box341968B01PUBLIC1.pdf?sequence=1) p.5.*

¹⁰⁰ *Ibid.* p.5.

¹⁰¹ *Ibid.*

¹⁰² International Alert, *Laws in Uganda: A Legislators' Guide Oil discussion Paper, no. 1, Oil discussion Paper, No. 1*, May 2011, (www.international-alert.org/sites/default/files/publications/18-Oil-web.pdf).

¹⁰³ EITI, *EITI guide for legislators: How to support and strengthen resource transparency*, 2009, (eiti.org/files/MP_EITI_Guide.pdf).

¹⁰⁴ *Natural Resource Charter, The Natural Resource Charter*, last accessed 29 October 2013, (www.naturalresourcecharter.org).

¹⁰⁵ NDI, *Transparency and accountability in Africa's extractives: The role of the legislature*, 2007, (www.ndi.org/files/2191_extractive_080807.pdf).

¹⁰⁶ World Bank Institute, *Welcome to the Parliamentary Strengthening Learning Program*, last accessed 29 October 2013, (parliamentarystrengthening.org). N.B. The IMF's work on fiscal transparency offers Uganda further resources on the road to transparency. These include the Manual on Fiscal Transparency the Code of Good Practices on Fiscal Transparency and, of particular relevance to the oil sector, the Guide on Resource Revenue Transparency.

¹⁰⁷ To read about the UHRC in more detail, see the proceeding chapter on "Guiding Businesses" (see p.10).

¹⁰⁸ HRC(1) (2011), *op. cit.* (n.6) Part I. Article B(3).

¹⁰⁹ Research compiled by Iain Clarkson, Antwerp, Belgium, 2012.

¹¹⁰ The Republic of Uganda(1) (1995), *op.cit.* (n.24), Article 54.

¹¹¹ The Republic of Uganda(1) (1995), *op.cit.* (n.24), Article 52(2).

with the presentation of position papers to relevant committees of Parliament to articulate any human rights concerns for consideration before the bills were passed into law... A number of recommendations made by the Commission were accepted and incorporated in the laws passed by Parliament and in government policies.”¹¹²

UHRC does not have a team dedicated to business and human rights issues and therefore staying on top of changes in this area is difficult. In order to stay current with legal and policy requirements to safeguard human rights amidst the growing oil industry, the UHRC could benefit from a specialist business and human rights expert or team.

Corporate law, securities law and other laws regulating the ongoing operation of businesses

Laws governing corporate creation, investment, governance, and behaviour

Laws and policies that govern the creation, investment in and ongoing operation of businesses in Uganda’s oil sector may also impact on human rights.¹¹³ Many of these are incorporated in corporate and securities law, such as the Companies Act,¹¹⁴ the Securities Central Depositories Act of 2009,¹¹⁵ the Chattels Securities Bill of 2009,¹¹⁶ the Sale of Goods Act of 1932,¹¹⁷ and the Partnership Act of 2010.¹¹⁸ Other key Acts governing companies’ behaviour include The Public Health Act, The Public Procurement and Disposal of Public Assets Act of 2003, The Public Procurement and Disposal of Public Assets Regulations of 2003, The Local Governments (Amendment) Act of 2006,¹¹⁹ The Local Government Regulations of 2006, and the Income Tax Act.¹²⁰

Such laws and policies govern the creation and ongoing operation of business enterprises and directly shape business behaviour. However, as the Guiding Principles point out,

“their implications for human rights remain poorly understood. For example, there is a lack of clarity in corporate and securities law regarding what companies and their officers are permitted, let alone required, to do regarding human rights. Laws and policies in this area should provide sufficient guidance to enable enterprises to respect human rights, with due regard to the role of existing governance structures such as corporate boards.”

In 2010, whilst still serving his mandate as the UN’s Special Representative for Business and Human Rights, Professor John Ruggie coordinated a research project entitled *Human Rights and Corporate Law: Trends and Observations from a Cross-National Study* examining whether and how such law fosters respect for human rights.¹²¹ The study looked at 40 jurisdictions; Uganda was unfortunately not one. Certain trends and opportunities were duly noted, and these would be of use to Uganda should a similar analysis take place there.

The analysis found that corporate and securities law does, to a limited extent, recognise human rights, in that, should a company fail to adequately identify, manage and report human rights impacts, resulting in harm to its interest, the company or its corporate officers may risk non-compliance with rules promoting

¹¹² Kaggwa S.K, “Access to remedy for corporate human rights”, *Uganda Human Rights Commission*, (www.humanrightsbusiness.org/files/ICC%20WG%20docs/file/access_to_remedy_for_corporate_human_rights_abusesuganda.doc) pp. 8-9.

¹¹³ Makerere University Business School, Department of Business Law, *Introduction To Company Law In Uganda*, (www.ekconsultinggroup.com/assets/resources/Business_Law_2_Notes.pdf).

¹¹⁴ The Republic of Uganda (10), *The Companies Act*, 2012.

¹¹⁵ The Republic of Uganda, *The Securities Central Depositories Act*, 2009.

¹¹⁶ The Republic of Uganda (11), *Chattels Securities Bill*, 2 January 2009.

¹¹⁷ The Republic of Uganda (12), *Sale of Goods Act*, 1932.

¹¹⁸ The Republic of Uganda (13), *Partnership Act*, 2010.

¹¹⁹ The Republic of Uganda (14), *Public Procurement and Disposal of Public Assets Act*, 17 January 2003.

¹²⁰ Interview; *IPIS and Lynn Turyatamba, International Alert Uganda*, Telephone, March 2013.

¹²¹ Human Rights Council (2), “Report of the Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, John Ruggie, Human Rights and Corporate Law: Trends and Observations from a Cross-National Study” (23 May 2011) *UN Doc A/HRC/17/31/Add.2* (www.business-humanrights.org/media/documents/ruggie/report-human-rights-and-corporate-law-23-may-2011.pdf).

corporate governance, risk management, and market safeguards. Nevertheless, the overarching trend identified by the research was that these areas of law lacked clarity over what companies and their officers were expected and/or permitted to do. Moreover the connection and communication between corporate regulators and government agencies tasked with protecting human rights or implementing obligations was limited or non-existent.¹²²

The report covered a number of legal issues, some of which were of particular relevance to businesses in the oil sector. This included the legal view of the company, i.e. whether the State views certain companies as having separate legal personality from their shareholders, enabling shareholders to have limited liability for actions of the corporation. In Uganda, this concept pertains (see Uganda's Companies Act 2012, Art. 18). Thus, for example, in *Kasule Abdul Rajab & Another v Kwong Fat Yuen Hong Ltd* the commercial division of Uganda's High Court cited *Frederick Sentamu v Uganda Commercial Bank & Anor* "to the effect that a limited liability company is a separate legal entity from its directors, shareholders and other members and the individual members of the company are not liable for the company's debts."¹²³

The effect of a company's form on its liability under law is significant. Firstly, affording separate legal personality and/or limited liability may mean that claimants are denied access to the assets of those who may be deemed in some way responsible for corporate harm (e.g. the parent company, directors, shareholders etc.), effectively minimising the company's liability. Another effect may be that, where shareholders and directors are protected from liability, they may not feel incentivised to effectively manage human rights risks. Secondly, certain forms of liability can also be limited by the difficulty of attributing a state of mind to corporations (e.g. criminal or guilty intent or recklessness) as a company does not have a mind of its own and is merely a fictitious legal person. Lastly, the creation of corporate groups, where companies set up a subsidiary with responsibility for the operations in another country (as has been the case with Tullow, Total and CNOOC), can effectively shield or quarantine a parent company from liability for acts with negative human rights consequences.¹²⁴

Other areas of law that may impact on human rights include those that provide conditions of incorporation (i.e. setting up) of companies or their listing on a stock exchange. This presents an opportunity for states to signal a preference for or require companies to recognise a duty to society (e.g. by having CSR policies), specifically human rights.¹²⁵

Directors' duties present another possibility for ingrained respect for human rights within corporate practice. For example, companies' directors may have a duty to avoid legal or reputational risk. Likewise the duties and composition of company boards can present an influential area of corporate governance. This might take the form of laws requiring gender, racial/ethnic representation on a board, non-discrimination laws, and representation of constituencies such as employees, representatives from civil society or affected communities, etc.¹²⁶

Lastly, addressing the way in which companies engage with the broader public also has the capacity to influence human rights respect. One example of this might be requiring or encouraging companies to disclose the impacts of their operations to non-shareholders. Corporate law may regulate whether non-shareholders are allowed to attend a company's annual general meetings – a forum in which issues directly affecting them may be discussed.

¹²² *Ibid.*

¹²³ The Republic of Uganda, *Kasule & Anor v Kwong Fat Yuen Hong Ltd*, 22 May 2013, *HCT-00-CC-MA-66-2013* (www.ulii.org/ug/judgment/commercial-court/2013/100).

¹²⁴ Nicolson R and Howle E, *Paper for ICJ Expert Legal Panel on Corporate Complicity in International Crimes: The Impact of the Corporate Form on Corporate Liability for International Crimes: Separate Legal Personality, Limited Liability and the Corporate Veil – An Australian Law Perspective*, 9 February 2007 (www.hrlrc.org.au/files/icj-paper-e-howle-and-r-nicolson-final-0207.pdf).

¹²⁵ For information on developments regarding requirements by governments and stock exchanges related to CSR disclosure see: Initiative for Responsible Investment, *Global CSR Disclosure Requirements*, last accessed 10 December 2013, (hausercenter.org/iri/about/global-csr-disclosure-requirements).

¹²⁶ *Ibid.* p.48.

Human rights due diligence

Human rights due diligence is “a means by which business enterprises can identify, prevent, mitigate and account for the harms they may cause, and through which judicial and regulatory bodies can assess an enterprise’s respect for human rights.”¹²⁷ It is the principle tool for businesses to address human rights risks, and will be discussed in the context of corporate responsibilities in Uganda’s oil sector in the third report in this series.¹²⁸

The following is a brief overview of the role that the State can play in requiring companies to implement human rights due diligence. The concept of due diligence is described in the Guiding Principles as follows,¹²⁹

“In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include:

- *assessing actual and potential human rights impacts,*
- *integrating and acting upon the findings,*
- *tracking responses, and*
- *communicating how impacts are addressed.*

Human rights due diligence:

- Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;*
- Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;*
- Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise’s operations and operating context evolve.”*

At the international level there has been considerable coordination to clarify what the business responsibility to conduct human rights due diligence actually means in practice. A number of initiatives have either called on companies to implement it or given detailed guidance.¹³⁰

Information box: Landmark initiatives regarding human rights due diligence

- The U.N. Security Council has called upon States to encourage their businesses involved in the trade in conflict minerals to conduct due diligence.¹³¹
- The Organization for Economic Cooperation and Development (OECD) and the International Conference on the Great Lakes Region have integrated due diligence into their frameworks for multinational enterprises as well as for responsible supply chain management in conflict situations.
- The European Union has begun to integrate human rights due diligence into its work on corporate social responsibility.¹³²

¹²⁷ De Schutter O, Ramasastry A, Taylor, M.B and Thompson R.C, *Human Rights Due Diligence: The Role of States*, December 2012, (accountabilityroundtable.org/wp-content/uploads/2012/12/Human-Rights-Due-Diligence-The-Role-of-States.pdf) p.1.

¹²⁸ Wass G and Musiime C, *Respect and Remedy: Implementing corporate responsibility under the UN Framework on Business and Human Rights*, IPIS Research and ActionAid International Uganda, tbp.

¹²⁹ HRC (1) (2011), *op.cit.* (n.6). Part II. Art. B(17).

¹³⁰ All examples provided in: De Schutter et al. (2012), *op. cit.* (n.127), p.8.

¹³¹ The Council supported the recommendation of its Group of Experts, which included a framework based on human rights standards. The Council also supported the Group’s call for business to conduct due diligence with respect to the trade in conflict minerals. 29 November 2010., S.C. Res. 1952, *U.N. Doc. S/Res/1952*.

¹³² In October 2011, the European Union issued a new definition of CSR based in part on the Guiding Principles and integrating the concept of due diligence. See Communication of the European Commission, A Renewed EU Strategy 2011-14 for Corporate Social Responsibility, *COM(2011) 681 final* (Oct. 25, 2011).

The above standards tend to focus on what businesses can do. The specific ways in which *States* themselves can legally require companies to adopt human rights due diligence processes are less clear. De Schutter, Ramasastry, Taylor and Thompson's have compiled *Human Rights Due Diligence: The Role of States*.¹³³ The report puts forward a number of regulatory options that States have at their disposal to ensure that companies act with due diligence in a host of subject areas. Some options applicable to Uganda are explored below:

- **Criminal Liability for a Company's Failure to Act with Due Diligence** – If a company has not acted with due diligence to prevent a crime, such as violent crimes or environmental crimes that might threaten the right to life or health, criminal responsibility might be imposed on a company. An example of this is the Canadian Environmental Protection Act, 1999 (CEPA), under which a company must observe a wide variety of requirements pertaining to pollution control and other environmental protection measures.¹³⁴ These are subject to criminal, civil and administrative penalties. The Act provides for a defence based on the exercise of "all due diligence to prevent [the] commission" of the offence. Should a Ugandan company face criminal liability for a similar offence, the courts could make it clear that such a defence (i.e. that all possible due diligence to prevent commission of the offence) would be required.
- **Civil Liability for a Company's Failure to Act with Due Diligence** – In most States, civil liability for a business enterprise can arise from causing a victim harm or prejudice, including by failing to act with due diligence to prevent such harms, i.e. negligence. This harm might include a negative impact on human rights. An example of this is the 1985 EU Products Liability Directive, for which conforming States must pass domestic laws to implement:

"The Directive provides, in Article 1, that "The producer shall be liable for damage caused by a defect in his product." ... "A product is defective when it "does not provide the safety which a person is entitled to expect,"... [however] Article 7 provides that a producer is not liable if, for example, "existing knowledge and science could not have discovered the defect."...

The imposition of civil liability onto the producers and manufacturers creates an incentive for them to not only take due care and proper precautions when designing products, but to also put in place preventive measures such as due diligence.¹³⁵ Such a law need not only cover products, but other actions of companies that might cause harm to a person. Uganda's PEPD could make it clear to companies active in the oil sector that, should harm come to Ugandans as a result of business activity, proof of authentic human rights due diligence could be used as a defence in court.

- **Administrative Penalties for a Company's Failure to Act with Due Diligence** – This option lies outside of the judicial sphere, using administrative regulation in certain sectors or areas to require companies to engage in due diligence. In turn, businesses may have to report to regulators or publically on the due diligence mechanisms they have in place to detect risks to human rights. This might further extend to reporting on the potential risks identified. Penalties can be imposed on businesses for a violation of regulatory provisions, and a regulatory body might be responsible for ensuring compliance. An example is the EU's 995/2010 regulation to prevent illegally harvested timber from entering the EU.¹³⁶ Businesses operating in Uganda could be faced with administrative penalties (such as fines or suspensions) should they fail to engage in State-mandated due diligence in particular circumstances, for example employing workers in particularly hazardous tasks.
- **Due Diligence as a Basis for Regulatory Approval** – As part of State processes for granting licenses, permits etc. for certain business activities, a requirement for/ encouragement of due diligence can be the basis for State approval. Environmental impact assessments are a common illustration of this, and there is nothing to stop NEMA from introducing such requirements in future oil block bidding rounds. For example:

"The Democratic Republic of Congo's mining regulations require all mining operations, including processors and transportation firms, to complete an Environmental Management

¹³³ De Schutter et al. (2012), *op. cit.* (n.127) p.3

¹³⁴ Canadian Environmental Protection Act, S.C. 1999, c. 33.

¹³⁵ De Schutter et al. (2012), *op. cit.* (n.127), p.18.

¹³⁶ De Schutter et al. (2012), *op. cit.* (n.127), p.24.

Project Plan and an Environmental Impact Study (“EIS”) before beginning a project. According to Article 458 of the Mining Regulations, this report must include a description of mitigation measures and rehabilitation efforts that have been completed; the status of mitigation and rehabilitation compared to those provided for in the approved Environmental Management Project Plan. The sanctions are administrative and can rise to the level of the suspension of mining contracts if environmental requirements are not met.”¹³⁷

- **Due Diligence as a Requirement for Doing Business with Government** – States may contract for goods and services through public procurement efforts and, in so doing, influence company practice by either requiring due diligence or providing preferential treatment in competition.¹³⁸ An illustration of this lies in the U.S. Federal Acquisition Regulation (which governs federal procurement) in which a person seeking to enter into a government contract must certify either that they will not supply an “end product” from a list of countries known to use forced or indentured child labour, or that, if the product features on the list, the contractor has made a “good faith effort to determine whether forced or indentured child labour”¹³⁹ was used to produce the items listed and that on the basis of those efforts, the contractor is unaware of the use of any child labour. The penalty for filing a false certificate can include suspension / termination of the contract and/or debarment from federal procurement for up to three years.¹⁴⁰ Uganda’s NatOil will enter into contracts with a number of international service delivery firms. Their cooperation could depend, for example, on assurances (based on human rights due diligence) from contractors that machinery has been sourced child-labour free, that workers have the right to unionise, and other rights-relevant issues.
- **Reporting, Transparency and Disclosure Requirements for Due Diligence** – Lastly,¹⁴¹ De Schutter et al explain that there is an increasing trend for States to require companies to disclose their policies and practices with respect to particular issues, especially those that impact on the public or certain communities, and those that carry a particular risk. This will be discussed further under the section Operational Principle 3D: Encouraging human rights reporting (p.38).

Not all of the above options will necessarily be suitable for Uganda’s context. However they do highlight that, although human rights due diligence is still an emerging concept, it is certainly possible for the Ugandan State (and other States) to legislate for it, and raise the bar regarding businesses’ responsibilities.

The Ugandan Oil Laws¹⁴²

In 2012, two laws were finalised in parliament: the Petroleum (Exploration, Development and Production) Bill 2012 (herein after referred to as the Upstream Act) and the Petroleum (Refining, Gas Processing and Conversion Transportation and Storage) Bill 2012 (herein after referred to as The Midstream Act). The Upstream Act was signed in March 2013 and the Midstream in July 2013. Although the Acts have merit because they create a stable framework for the sector, their content was censured for lacking key clauses to ensure a safe and efficient oil sector.

Paper One of this series - *Uganda’s oil sector and potential threats to human rights* – discusses the Oil Laws’ shortfalls in depth.¹⁴³ Issues include an absence of parliamentary oversight¹⁴⁴ and a lack of guarantees

¹³⁷ De Schutter et al. (2012), *op. cit.* (n.129), p.24.

¹³⁸ De Schutter et al. (2012), *op. cit.* (n.129), p.29.

¹³⁹ United States Department of Labor, Bureau of International Labour Affairs, *Executive Order 13126 on the “Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labor,”* signed on June 12, 1999, last updated 23 July 2013 (<http://www.dol.gov/ILAB/regs/eo13126/>).

¹⁴⁰ General Services Administration Department of Defense National Aeronautics and Space, *Federal Acquisition Regulation, Volume I – Parts 1 to 51, § 22.1503,* (<http://www.acquisition.gov/far/current/pdf/FAR.pdf>).

¹⁴¹ Other options include making due diligence a condition for international trade and investment support, or encouraging due diligence through consumer protection law. However these are not particularly relevant to the oil production issues discussed in this paper.

¹⁴² Iain Clarkson, Antwerp, Belgium, 2012

¹⁴³ Wass G and Musiime C, *Business, Human Rights, and Uganda’s Oil. Part I: Uganda’s oil sector and potential threats to human rights,* IPIS Research and ActionAid International Uganda, updated October 2013, (www.ipisresearch.be/download.php?id=413).

¹⁴⁴ Global Witness, *Uganda’s petroleum legislation: Safeguarding the sector,* 28 February 2012, (www.globalwitness.org/sites/default/files/library/Ugandas%20petroleum%20legislation%20-%20Safeguarding%20the%20sector_0.pdf).

regarding contractual and financial transparency. The Acts include no provision requiring companies to meet certain environmental or social standards before being able to apply for licences or being granted them; this would have offered an opportunity for the government to check companies' suitability and track record.¹⁴⁵ The Acts also often refer to 'best petroleum industry practice' but are no more specific than this, thereby offering no benchmark.¹⁴⁶ Although the Acts make reference to fines for the violation of social and environmental provisions, Global Witness states that these are "insufficient to act as a successful deterrent."¹⁴⁷

The government has also drafted a third Bill related to the oil sector - the *Public Finance Bill*.¹⁴⁸ This legislative draft consolidates existing public finance management laws and addresses the management of oil revenues, the role of Parliament in this process, and emergency responses. Again, this Bill's draft has been criticised for lacking Parliamentary oversight and transparency.

Although (apart from the Public Finance Bill) Uganda's petroleum legislation is now in place, there is concern that it does not strengthen the sector as much as it could have done. The oil laws form the foundation of what defines the strength of governance over Ugandan oil. Commentators from Uganda's major media outlets fear that failures in the areas of transparency, democracy and openness will not foster a climate conducive to respect for human rights on the part of both companies and the State.¹⁴⁹ Moreover, there is concern that even the positive aspects of the Bills may not be enforced, a common complaint regarding Uganda's legislation.

Encouraging human rights reporting and communication

Businesses' processes to assess and mitigate negative human rights impacts should be openly communicated to the greatest extent possible. Again, States should take an active role in encouraging or even incentivising¹⁵⁰ open communication of human rights impact assessments and similar measures in order to create a level playing field for all businesses. On page 28, when considering how Human rights due diligence could be implemented under State law, the question of how States can legislate for human rights reporting was introduced. This provided an example of State requirement for human rights reporting.

De Schutter et al., in their report, *Human Rights Due Diligence: The Role of States*, illustrate some of the trends behind human rights reporting:

"States have started to require companies, particularly large publicly listed companies, to disclose whether they have policies and activities focused on corporate social responsibility (CSR)... In addition, States have begun to enact legislation that requires companies to disclose their due diligence activities with respect to particular human rights issues, most notably, prevention of human trafficking, and use of conflict minerals."

An example of requiring CSR engagement and subsequent location of human rights issues is provided in Section 99 of the Danish Financial Statements Act, which requires companies above a certain size¹⁵¹ to publish an annual CSR report that states whether or not the company has a CSR policy, and includes at least a summary of such a policy. Any company that reports on its CSR policy must include both human rights and climate change provisions in such a policy. CSR reports covered by the reporting

¹⁴⁵ *Ibid.* p.2.

¹⁴⁶ Global Witness suggests the following: International Finance Corporation Performance Standards; The IMF's Guide on Resource Revenue Transparency; The Natural Resource Charter; Extractive Industry Transparency Initiative; The Citizens Checklist from the Global Witness Report; Rugged: The Scramble for Africa's Oil, Gas and Minerals. Taken from *Ibid.*

¹⁴⁷ *Ibid.* p.3.

¹⁴⁸ The Republic of Uganda, *The Public Finance Bill*, 2012, File No: FPC/230/213/02, (www.acode-u.org/documents/oildocs/Public_Finance_Bill_2012.pdf).

¹⁴⁹ For example, see Matsiko H and Mubatsi Habati A, "Parliament to pass weak laws on oil" in *The Independent*, last updated 17 March 2012, (www.independent.co.ug/cover-story/5427-parliament-to-pass-weak-laws-on-oil).

¹⁵⁰ The Guiding Principles suggest, "Incentives to communicate adequate information could include provisions to give weight to such self-reporting in the event of any judicial or administrative proceeding." HRC (1) (2011), *op. cit.* (n.6) Para B(3).

¹⁵¹ Along with certain institutional investors, mutual funds and other listed financial enterprises.

law are subject to auditing. Non-compliance by either the management or the auditor with applicable requirements is subject to a fine.

Taking disclosure requirements further, section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act is a landmark example of due diligence regulation. Section 1502 requires companies with securities registered with the Securities and Exchange Commission (i.e. traded on the US stock exchange) to report on their due diligence with respect to conflict minerals originating in the Democratic Republic of the Congo or an adjoining country.¹⁵² This report takes the form of a submission to the SEC detailing the measures the company has taken to exercise due diligence on the conflict minerals' source and chain of custody.

After due diligence has been conducted, and if a company is unable to determine whether its products are "DRC conflict free" (i.e. they have not been used to directly or indirectly finance or benefit armed groups in the region) – the company must report that the products are "DRC conflict indeterminable." The company must then also report on the specific due diligence methods taken to exercise due diligence on the source and chain of custody of the conflict minerals.

Human rights reporting can also be very effective as either an encouraged or incentivised process from the State. To achieve this, States can publish guidelines on human rights for businesses (sector-specific or otherwise) that include details on reporting, or else they can publically endorse certain global reporting standards. Illustrative of both of these methods, part V of the European Commission's (EC) Oil and Gas Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights describes how companies can incorporate reporting, formal or otherwise, of human rights, and directs companies to useful materials.¹⁵³

Incentivisation can further nudge companies into reporting their human rights impacts. The Guiding Principles suggest, "Incentives to communicate adequate information could include provisions to give weight to such self reporting in the event of any judicial or administrative proceeding."¹⁵⁴

In addition to the distinction between encouraging, incentivising, and requiring reporting, Professor Ruggie's corporate law project highlighted that State requirements to report tend to focus on reporting of policies rather than impacts. Moreover, non-financial reports are not subject to the same accessibility and verification requirements as financial reports.¹⁵⁵ Should Uganda consider encouraging non-financial reporting from companies related to their oil sector, assessment of how such reports can be made public, and efficiently verified, would be a very pro human-rights measure. Reporting whether or not a company has a human rights policy is, to an extent, useful. However it does not touch on the depth or level of accountability as the details of human rights impact assessments and due diligence.

Somewhat more common than published reports on human rights, communicating with local communities takes the form of a component of the stakeholder consultation process. In some situations, this can be the most appropriate means by which to ensure that the local population – those directly affected by a given project – are able to know about the issues affecting them. The downside is that local reporting, if not also publically reported, is limited in its transparency, and not available for outside parties to analyse.

The authors asked the three major oil companies whether they had been encouraged by the Ugandan government to communicate to the public how they measure human rights impacts. From CNOOC

¹⁵² Congress of the United States of America, *Dodd-Frank Wall Street Reform and Consumer Protection Act*, H.R. 4173, July 2010, Section 1502.

¹⁵³ European Commission (authored by Shift and the Institute for Human Rights and Business), *Oil and Gas Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights*, 2013, (ec.europa.eu/enterprise/policies/sustainable-business/files/csr-sme/csr-oag-hr-business_en.pdf) p.68.

¹⁵⁴ HRC, *op. cit.* (n.6) Para B(3).

¹⁵⁵ Mandate of the Special Representative of the Secretary-General (SRSG) on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, Corporate Law Project: Overarching Trends and Observations, July 2010 (198.170.85.29/Ruggie-corporate-law-project-Jul-2010.pdf) p.2.

Uganda¹⁵⁶ and Tullow's¹⁵⁷ responses it was not possible to gather this information. Total responded that although they felt Uganda to be proactive on the issue of *identifying* social impacts, the follow-up was not systematic. Total reported that they preferred to lean on their own "strong internal" standards in this regard.¹⁵⁸ Indeed, all three companies referred frequently to community consultation measures, however these appeared to be self-initiated ventures, rather than at the demand of the Ugandan government.

These accounts indicate that Uganda does to seem to be encouraging companies to publically communicate relevant internal analyses. In order to ensure that companies feel encouraged to assess human rights impacts and be made transparent and accountable, Uganda should consider steps to implement reporting requirements or, at the very least, encourage companies to refer to relevant standards.

The State-business Nexus, State-contracted services, and State transactions

State-owned and controlled companies and services

Where a company is owned or controlled by the State (or where a company's acts can be otherwise attributed to the State) human rights abuse by that business may entail a direct breach of the State's obligation to respect human rights.¹⁵⁹ State-owned enterprises (SOEs) or state-controlled enterprises can range from export credit agencies, official investment insurance or guarantee agencies, development agencies and development finance institutions, to oil and water companies. In order for States to comply with their international legal obligations, they must take additional steps to ensure that such companies respect human rights. Likewise, the State's commercial transactions offer an opportunity to promote respect for human rights with their business partners.

The most relevant example of SOE in this context is Uganda's National Oil Company (NatOil), provisioned by the Petroleum Acts. In order to ensure that rights are respected, NatOil will need to maintain the highest standards of good practice. The Guiding Principles advise attainment of these standards through the practice by SOEs of human rights due diligence (see p.29). Such due diligence would enable the Ugandan State to ensure that no adverse human rights impacts occur as a result of their companies' conduct, and would set an example for foreign companies working on their soil.

Moreover, many SOEs fulfil both commercial and social functions, and are therefore useful tools for addressing social concerns such as inequality. Timothy Kyepa from the South African Institute for International Affairs (SAIIA) has highlighted the importance of corporate governance, that is, the systems of laws, rules, and policies that control company operations in SOEs.¹⁶⁰ As SOEs have to fulfil both shareholder and stakeholder values¹⁶¹ they require a particularly clear governance framework.¹⁶²

Uganda's governance framework of SOEs could be more encompassing. An aspirational corporate governance framework could be Norway's. The corporate governance guidelines of the Institute of Corporate Governance of Uganda and the Capital Markets Authority "define corporate governance from a shareholder perspective and only refer to stakeholders in passing."¹⁶³ However, in Norway's system

¹⁵⁶ CNOOC responded by saying, "CNOOC Uganda Limited has carried out open dialogues to its stakeholders on operations, as well as how the operations will impact on them. The appropriate mitigation measures have been implemented with the inputs of the stakeholders." CNOOC (2013), *op.cit.* (n.18).

¹⁵⁷ Tullow's response: "Whilst executing our operations, the Government of Uganda expects Tullow to comply with all the relevant legislation, regulation and policies which promotes human rights doctrines. Government of Uganda also protects and promotes the rule of law and doctrines of fairness and equality by ensuring transparency and accountability." Tullow (2013), *op.cit.* (n.17).

¹⁵⁸ Total (2013), *op.cit.* (n.16).

¹⁵⁹ Iain Clarkson, Antwerp, Belgium, 2012

¹⁶⁰ Kyepa, T, *Corporate Governance of State-Owned Extractive Companies: What Uganda Can Learn From Norway*, South African Institute of International Affairs, Policy Briefing No. 64. March 2013 (www.saiia.org.za/images/stories/pubs/briefings/saia_spb_64_GARP_kyepa_20130411.pdf).

¹⁶¹ As Kyepa explains, "the main characteristic of the shareholder-oriented model of corporate governance is maximisation of shareholder wealth, whereas the major characteristic of the stakeholder-oriented model is wealth and value creation for all stakeholders" *Ibid.*

¹⁶² Kyepa (2013), *op.cit.* (n.112).

¹⁶³ *Ibid.*

not only does the definition of corporate governance take stakeholders into account, but the country's corporate governance framework includes enforceable administrative policies crafted for SOEs. These policies include principles such as transparency, performance targets, independent control of the SOE's management by a board of directors (which cannot include ministry officials, members of parliament, ministers or state secretaries), and a corporate assembly. Unlike Norway, Uganda does not have a central institution dedicated to supervising SOEs.

Yet Kyepa points to some cause for hope. Whilst previously, limited corporate governance matters fell under the Companies Act chapter 110 of 1961, the Capital Markets Authority Act chapter 84 of 1996 (as amended), and the Financial Institutions Act 2 of 2004, 2012 saw the passing of the Companies Act, which sought to broaden the need for corporate governance further than just financial institutions and listed companies.¹⁶⁴ Importantly, the Act has a Corporate Governance Code annexed to it, with some very useful clauses regarding transparency, sustainability reporting (Clause 15) and ethical commitments to stakeholders (Clause 16). Nevertheless, the Act does not require companies to incorporate all of the Code or, in some cases, any of it. Indeed, as the Petroleum Acts do not address the relationship and responsibilities of NatOil to stakeholders, under this legal framework, essential elements of good SOE governance are not assured.

Kyepa makes the following recommendations to Uganda regarding its national oil company's governance, using the Nigerian SOE Statoil as a best-practice model: 1) The Government of Uganda should enact corporate governance guidelines for the NOC (and other SOEs), within which transparency and stakeholder involvement should be specifically emphasised. The guidelines/framework should be mandatory for both listed and unlisted SOEs. 2) The corporate governance framework should cater for all stakeholders rather than just shareholders, thereby specifically meeting the needs of SOEs. 3) The Ugandan Government should establish an institution to ensure that SOEs comply with corporate governance requirements and other regulations).

There is already concern about the role that NatOil will play in enabling or obscuring human rights. Mr. John Muwanga, Uganda's Auditor General, has expressed concern about the limited oversight of NatOil particularly in sight of ingrained problems with corruption in Uganda; NatOil operations will not be directly audited by Mr Muwanga's office. A confidential report titled "Strategic Options and Recommendations for the formation of the Uganda National Oil Company" prepared for the Ministry of Energy by PricewaterhouseCoopers (PWC),¹⁶⁵ allegedly recommends that the government joins the EITI, in addition to warning about blurred reporting lines and the risk of public distrust.

Running NatOil in a transparent and rights-respectful manner will be a key component of gaining the trust of Ugandan people, ensuring that oil money is used for public good, and ensuring that Uganda sets a high-standard in what is expected from companies in terms of their respect for human rights.

State-contracted services, and State commercial transactions

The Guiding Principles stress that, when States contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights, they should exercise adequate oversight in order to meet their international human rights obligations. States should also promote respect for human rights by business enterprises with which they conduct commercial transactions.

In the oil, business and human rights picture, the purchase of services to handle the placement of the refinery is a very pertinent example of the need for the Ugandan State to exercise effective oversight over a company that has a profound impact on populations. The State has contracted Strategic Friends International (SFI) to compensate and, where necessary, resettle up to 7,000 affected people. There have been a number of complaints about compensation inadequacies, people being coerced into signing forms or receipts that they do not understand, being threatened, and receiving inadequate information about procedures.¹⁶⁶ SFI has strongly denied many of the claims made by local people and groups, and denied responsibility for others. SFI has asserted that they have made every effort to conduct their

¹⁶⁴ Republic of Uganda (10) (2012), *op.cit.* (n.114).

¹⁶⁵ Published 24th June 2011 [confidential].

¹⁶⁶ Ssekika, E, 'Oil refinery: compensation rates get complicated', *The Observer*, last updated 13 August 2013, (<http://goo.gl/2UG5Zc>).

business responsibly. This case study exemplifies the Guiding Principle-described necessity for monitoring and accountability mechanisms over these State-contracted services.

Countries can, and are, taking strong positions on how public procurement can impact on human rights, as exemplified by the paper, *Walk the talk: Ensuring socially responsible public procurement – SRPP Guide* – developed by the Norwegian Agency for Public Management and eGovernment (Difi), on request from the Norwegian Ministry of Children, Equality and Social Inclusion.¹⁶⁷

Supporting business respect for human rights in conflict-affected areas

When areas are affected by conflict, the risk of gross human rights abuse increases. Should the oil sector become affected by conflict, human rights would likely become particularly vulnerable, and their protection fragile. The Guiding Principles make four recommendations to States so that they can ensure that businesses do not become involved in gross, conflict-related human rights abuses:

“(a) Engaging at the earliest stage possible with business enterprises to help them identify, prevent and mitigate the human rights-related risks of their activities and business relationships;

(b) Providing adequate assistance to business enterprises to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence;

(c) Denying access to public support and services for a business enterprise that is involved with gross human rights abuses and refuses to cooperate in addressing the situation;

(d) Ensuring that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses.”



An oil truck transport's petroleum within Uganda. Within a few years, such fuel will be extracted and refined within Uganda. Copyright: Stefan Gara, 2004, Creative Commons Under a Creative Commons Licence. (Please see: <http://creativecommons.org/licenses/by-nc-nd/2.0/legalcode>).

¹⁶⁷ The Norwegian Agency for Public Management and eGovernment (Difi) on request from the Norwegian Ministry of Children, Equality and Social Inclusion, *SRPP Guide Walk the talk: Ensuring socially responsible public procurement*, 14 November 2012, (anskaffelser.no/filearchive/srpp-guide_november-14-2012.pdf).

Uganda, although currently enjoying relative peace, should not remain complacent about conflict-risk factors, particularly given the history of oil and conflict in countries like Nigeria, and a number of factors that commentators have highlighted.

One such risk factor is that Uganda is land-locked. In 2007, during the Kenyan election violence, the country experienced months of disruption to the supply of fuel and other goods,¹⁶⁸ illustrating Uganda's dependence on transport corridors. One of the most celebrated hopes that oil prospecting brought to Ugandans was the opportunity for self-sufficiency, specifically in terms of fuel. However, to even supply the country with machinery and set up a refinery depends on such transport channels. Moreover, even though Uganda will be setting up its own refinery, it has still agreed with the companies operating in the country that it will export a significant portion of crude oil by pipeline. Uganda's dependence on its neighbours therefore remains significant.

Another dynamic is the changing position of Uganda as a potential "oil power". Since Uganda discovering oil, Kenya has made impressive finds while Tanzania has also discovered it sits on world-class reserves of natural gas.

Some commentators have warned that having all the three original members of the East African Community developing their oil and gas sector might lead to regional petro-rivalry. South Sudan's decision not to include Uganda in a three-way pipeline deal with Kenya, for example, could be a cause of resentment to Ugandan authorities, especially given President Museveni's long-time allegiance with the Sudan People's Liberation Movement.¹⁶⁹

A third conflict-risk is the insecurity in Eastern DRC, Uganda's western neighbour that has long been affected by severe conflict and human rights abuses. As recently as November 2013, international forces were fighting the M23 rebel group, which had previously taken control of one of DRC's major cities, Goma. Other groups, including Rwandan and Ugandan rebels, remain active near the Ugandan border. The Ugandan ADF rebels potentially pose the greatest risk to Kampala's oil sector development as Nick Young, the previous Managing Editor of Oil in Uganda, has explained,

*"This underlines the possibility, which Ugandan security services have recently emphasised, of a terrorist attack on Uganda's oil installations by the so-called Allied Democratic Forces (ADF). They are thought to have been re-grouping in the DRC since 2010, when their leader, Jamilu Mukulu, narrowly escaped capture in Kenya. Anger at Uganda's role in inflicting military defeats on Al-Shabaab in Somalia may swell ADF ranks with international Salafist extremists. After the devastating terrorist assault on a gas plant in Algeria last month, no-one should doubt that oil and gas facilities provide an attractive target for extremists."*¹⁷⁰

Meanwhile, border disputes also pose a risk, as exemplified by the tensions between Tanzania and Malaŵi over who owns Lake Malaŵi/Nyasa since Malaŵi started prospecting for oil there. DRC's eastern borders cut through Lakes Albert, Edward and Tanganyika. Already, violence presented itself on Lake Albert in August 2007, when a geologist working for Heritage Oil and Gas was fatally shot by Congolese soldiers. Shortly after, (for reasons that reportedly remain unclear) six Congolese citizens travelling on a passenger ferry on the same lake were shot by Ugandan soldiers.¹⁷¹

Lastly, national and location-specific militarisation presents its own threats. President Museveni spent US\$ 744 million on six Russian fighter jets in 2011. Some have expressed concern that this kind of military-equipment could precipitate a regional arms race. Meanwhile, oil-production areas are becoming increasingly militarised. The presence of military and police personnel around oil sites is intended to safeguard these areas.¹⁷² However, it can also make local communities nervous.¹⁷³ In Nigeria, for example,

¹⁶⁸ Young, N, "Will oil fuel cooperation or conflict?", *Oil in Uganda*, last updated 12 March 2013 (www.oilinuganda.org/features/opinion/will-oil-fuel-cooperation-or-conflict.html)

¹⁶⁹ Young N (2013), *op.cit.* (n.170).

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*

¹⁷² Nakayi R, "Is Uganda's Oil region another northern Uganda in the making?" *African Arguments*, last updated 26 June 2013 (africanarguments.org/2013/06/26/is-uganda%E2%80%99s-oil-region-another-northern-uganda-in-the-making-%E2%80%93-by-rose-nakayi/).

¹⁷³ Interview; *IPIS and International Alert*, Kampala, Uganda, February 2013.

the use of private military companies and State forces has had a ruinous effect on community dynamics. The forces are often equipped with very powerful weapons, and stand accused of serious human rights abuses.¹⁷⁴

Whilst the Guiding Principles refer to conflicts, domestic tensions on and around oil sites can also escalate. This can be partly due to unfulfilled expectation. For example, anticipation in Hoima of the benefits of oil production is high. Yet it is the local communities who might feel the negative effects of oil, including oil spills and relocation. Promises of bringing employment to the region can also fall short of expectations, due to an acute shortage of necessary skills.¹⁷⁵

According to the UK-based oil industry newsletter, *Afroil*, a group of pastoralists reportedly “invaded the Waraga-1 well site” operated by Tullow Oil Pty in Buseruka sub-county, Hoima District, “A local Toonya [sic] official had expressed concerns about the recent increase in pastoralists settling around the well to access water and grazing lands,” the March 20, 2012 issue of the newsletter reported. “This comes amid accusations from local residents of encroachment by Tullow in the area, which has aggravated existing inter-communal land disputes.”¹⁷⁶

Meanwhile, across the border in Kenya, Tullow was forced to suspend exploration work in the Turkana area in October 2013, after the local population staged a demonstration outside the Twiga1 camp, protesting against being denied jobs and business opportunities by the company.¹⁷⁷

International Alert has contextualised some of these patterns,

“The Albertine region is also an area that embraces a multiplicity of local government authorities, traditional institutions and people of various ethnic groups. Given this fragmented identity, the discovery of oil has the potential to stir up tensions along different lines. Therefore, in Uganda, where rural livelihoods largely derive from natural resources, careful management of the impact of oil exploration is crucial for ameliorating the livelihood vulnerabilities of rural households as well as resolving the raging conflicts. It is important to consider mainstreaming conflict-sensitive analysis in programming for the oil and gas sector.”¹⁷⁸

The Ugandan State should ensure that its legislation, policy and regulations address conflict risk. Uganda has many resources that can help it to do so. For example, oil companies can be encouraged to adopt the Voluntary Principles on Security and Human Rights.¹⁷⁹ Organisations such as International Alert and the Office of the United Nations High Commissioner for Human Rights are also well positioned to advise on specific risks and measures. Meanwhile local institutions such as local councils have the capacity to help ensure that domestic conflicts are quickly resolved.

The Ugandan State can maximise regional cooperation and follow through on any commitments made, whilst putting in place actions to retain domestic stability. Addressing the calls of the Guiding Principles to work with businesses and hold them to a high standard, Uganda has a number of resources within grasp. Should any company’s actions contribute to conflict and / or gross-human rights abuses, Uganda should take a firm stance on withdrawing support and approval.

Ensuring Policy Coherence

State governance is an enormous, disparate task. Many functions of governments occur in isolation from, and sometimes tension with, one another. As a response to this, Operational Principles Eight to Ten offer directions as to how States can ensure that, across departments and policies, decisions are consistently in line with business and human rights principles.

¹⁷⁴ Abrahamsen R. and Williams M., 2005, *The Globalisation of Private Security: Country Report: Nigeria*, (University of Wales, Aberystwyth).

¹⁷⁵ Nakayi R (2013), *op.cit.* (n.172).

¹⁷⁶ Oil in Uganda, *Oil Timeline*, accessed 3 December 2013 (www.oiluganda.org/categories/oil-timeline).

¹⁷⁷ Daily Nation (Kenya), *Turkana MP under probe over riots against Tullow oil firm*, last updated 30 December 2013 (www.nation.co.ke/news/MP-under-probe-over-Turkana-riots/-/1056/2053848/-/3rffmsz/-/index.html).

¹⁷⁸ International Alert, *Governance and livelihoods in Uganda’s oil-rich Albertine Graben*, March 2013.

¹⁷⁹ Voluntary Principles on Security and Human Rights, 2000. N.B. These principles are further explored later in this series.

State institutions

The Guiding Principles recommend that governmental departments, agencies and other State-based institutions that shape business practices are aware of and observe the State's human rights obligations when fulfilling their respective mandates. The State might fulfil this recommendation by providing these institutions with relevant information, training and support. Ensuring that necessary policies, laws and processes are in place for Uganda to implement its international human rights law obligations falls under the umbrella of *vertical policy coherence*. Support from departments and agencies that shape business practices constitutes *horizontal policy coherence*.

The Guiding Principles highlight the following as relevant agencies engaged with human rights practice: those responsible for corporate law and securities regulation, investment, export credit and insurance, trade and labour. In the context of corporate compliance in the Ugandan oil sector the Petroleum Exploration and Production Department (PEPD) of the Ministry of Energy and Mineral Development, and the Ministry of Lands, Housing and Urban Development are of particular relevance. Perhaps of all of these departments, the PEPD is the most pivotal due to their oversight of the industry, and their coordination role between other relevant departments.

A problem that can also inhibit the incorporation of human rights concerns into the functioning of ministries is communication and the clear definition of roles between ministries themselves. If two ministries view certain processes or responsibilities fall under the umbrella of each other, or if data is not efficiently passed between them, the intended beneficiaries may suffer. Citing the example of land rights in Uganda, one commentator has noted that,

“the Investment Code Act and the Land Act, among other relevant laws, assign unclear and sometimes overlapping authorities to different government institutions that in practice play a role in the process of transferring land to investors... [There are no] regulations to guide the interaction of different government agencies, for example in identifying government land suitable for a particular investment. At a minimum, the lack of legal and procedural clarity on the duties of the UIA and other government authorities in allocating government land to investors creates opportunities for inefficiencies – and perhaps even corruption (Bogere 2011). In fact, a recent audit of the Uganda Land Commission found several cases where the same parcel of government land was allocated to two or three different investors with different lease titles (Bogere 2011). Some investors apparently go directly to the President of the Republic to secure land.”¹⁸⁰

In horizontal policy coherence, as with vertical policy coherence, success hinges on an established plan by the government to entrench business and human rights principles into State practices. There is little available evidence that human rights principles have been absorbed across ministries and departments in Uganda. For example, a World Bank review of the Uganda Justice Law and Order Sector published in July 2009 reported a “great need for human rights training for most sector institutions... efforts to provide this training were fragmented and irregular.”¹⁸¹ However, it should be noted that this was four years before the publication of this report, and only a year after Ruggie's 2008 report – perhaps too early to translate the UN's business and human rights principles into practice.

Investment treaties and contracts

States place a lot of emphasis on the creation of economic opportunities. Entering into bilateral investment treaties and free-trade agreements with other states can be seen as ways to enable such opportunities in a stable framework. However there are increasing concerns about the ways in which such instruments constrain or adversely affect domestic policy. They might, for example, inhibit the State from passing new legislation (including human rights and environmental legislation) if such legislation counteracts a provision in a treaty or agreement the State has become a party to.

¹⁸⁰ Stickler, M.M, *Governance of Large-Scale Land Acquisitions in Uganda: The role of the Uganda Investment Authority*, Paper presented at the International Conference on Global Land Grabbing II October 17-19, 2012, Organized by the Land Deals Politics Initiative (LDPI) and hosted by the Department of Development Sociology at Cornell University, Ithaca, NY.

¹⁸¹ The World Bank, *Uganda Legal and Judicial Sector Study Report*, July 2009, p.5.

Likewise, contractual agreements between States and companies can also contain provisions that either enable or subdue human rights protection. Production Sharing Agreements (PSAs) between State and company have been the subject to widespread debate in this regard. Such agreements can contain clauses that, like bilateral investment treaties and free trade agreements, can give them precedence over national legal provisions. Thus confidentiality clauses may, for example, be able to override provisions promoting openness in national law,¹⁸² whilst stabilisation clauses¹⁸³ can risk stifling domestic legal and policy development.

The stabilisation clauses contained within Uganda's PSA with Tullow Oil have sparked notable concern. This PSA has not itself been made public, however a leaked draft version is available in the public sphere. Paragraph 33.2 of a leaked agreement contains a stabilisation provision which states,

"If, following the Effective Date, there is any change, or series of changes, in the laws or regulations of Uganda which materially reduces the economic benefits derived or to be derived by Licensee hereunder, Licensee may notify the Government accordingly and thereafter the Parties shall meet to negotiate in good faith and agree upon, the necessary modifications to this Agreement to restore Licensee to substantially the same overall economic position as prevailed hereunder prior to such change(s). In the event that the Parties are unable to agree that the Licensee's economic benefits have been materially affected, and/or are unable to agree on the modifications required to restore Licensee to the same economic position as prevailed prior to such change, within ninety (90) days of the receipt of the notice referred to hereinabove, then either Party may refer the matter for determination pursuant to paragraph 26."¹⁸⁴

The Civil Society Coalition on Oil in Uganda (CSCO) has analysed the terms of para.33.2, finding them to denote that if Uganda develops new and improved regulations that increase costs for the oil company, they could have to restore these costs to the company. Such provisions have been argued to have "chilling" effects on environmental and human rights legal evolution.¹⁸⁵

The Guiding Principles urge Uganda to exercise caution to "retain adequate policy and regulatory ability to protect human rights under the terms of such agreements, while providing the necessary investor protection."¹⁸⁶ Given the concern over existing contracts in the oil industry, this is certainly a high-impact area of law that Ugandan authorities should consider carefully. In 2011, John Ruggie released another report under his UN Mandate - *Principles for responsible contracts: integrating the management of human rights risks into State-investor contract negotiations: guidance for negotiators*. These would be useful guidelines for the Government of Uganda in the context of any future contractual or treaty agreements.¹⁸⁷

¹⁸² IPIS and Lynn Turyatemba, (2013), *op.cit.* (n.15).

¹⁸³ Stabilisation clauses are often found in production sharing agreements, requested by companies to ensure that, if certain domestic laws change within the duration of the contract, the company will be insulated from any adverse impacts of such changes from the day of signing. This can involve the restoration of an "economic equilibrium" whereby the economic consequences of legal changes are calculated, and either the contract amended accordingly, the company be exempted from the legislative measure or economic compensation awarded. The validity of such clauses has been challenged by critics who highlight that they risk undermining State sovereignty, and are potentially incompatible with international legal norms.

¹⁸⁴ Lay T. and Minio-Paluello M., *Contracts Curse. Uganda's oil agreements place profit before people*, Civil Society Coalition on Oil in Uganda and Platform, February 2010 (www.acode-u.org/documents/oildocs/CSCO_oilcurse.pdf), p.8.

¹⁸⁵ Amnesty International UK, *Human Rights on the Line - The Baku-Tbilisi-Ceylan Pipeline Project*, 2003, p.5.

¹⁸⁶ HRC, *op. cit.* (n.6) Section 1 Para B(9).

¹⁸⁷ Human Rights Council (2), United Nations General Assembly, 'Principles for responsible contracts: integrating the management of human rights risks into State-investor contract negotiations: guidance for negotiators,' 25 May 2011, *A/HRC/17/31/Add.3*.

UN Guiding Principle: The Host State Duty to Provide Access to Effective Remedy

Foundational Principle 25: Access to remedy

The third pillar of the UN framework for business and human rights concerns greater access to remedies for victims. Here, States must take steps to ensure that, when abuses do occur, victims can obtain a remedy through judicial, administrative, legislative or other appropriate means. Grievances may arise as a result of breaches of “law, contract, explicit or implicit promises, customary practice, or general notions of fairness of aggrieved communities.”¹⁸⁸ Any remedy should counteract or make good the human rights harm and can include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions, as well as the prevention of future harm.

State-based judicial mechanisms

The Ugandan Constitution provides that any “person who claims that a fundamental or other right or freedom guaranteed under this Constitution has been infringed or threatened, is entitled to apply to a competent court for redress.”¹⁸⁹ The rights guaranteed are listed in Chapter Four of the Constitution and include the right to life, respect for human dignity, protection from deprivation of property (including home), protection from slavery, and the right to a clean and healthy environment. It also guarantees the independence of the judiciary¹⁹⁰ and provides an appeal system.¹⁹¹

Uganda’s judiciary is structured according to art. 129 (1) of the Constitution. As such it is comprised of a Supreme Court, a Court of Appeal (sitting as the Constitutional Court), a High Court and Subordinate Courts.¹⁹² The High Court has established a number of divisions to handle specific fields of law, including a Family Division, Criminal Division, Anti-Corruption Division, War Crimes Division, Land Division, Civil Division and Commercial Division.¹⁹³ Under civil procedure, to bring the State or a company to account over a human rights complaint, a Ugandan would have to file a case against the Attorney General. This provides that there is access for recourse in a valid and relatively open court, a fundamental part of ensuring the promotion of human rights.

Successful cases have also been brought against companies in the Ugandan High Court. 2010 saw a High Court case between the NGO, Sexual Minorities Uganda and a Ugandan newspaper called “Rolling Stone.” Sexual Minorities Uganda sought to stop the paper from publishing the names, home addresses and photos of gay rights activists, after the paper had published activists’ personal information with a headline that read: “Hang Them; They are After Our Kids!!!!”. David Kato, a prominent gay rights activist was subsequently murdered in his home after his personal details were published in the newspaper. The court granted the plaintiffs a permanent injunction.¹⁹⁴

Another landmark case was raised against Kaweri-Coffee-Plantation, owned by the German company, Neumann Kaffee Gruppe (NKG). On the 11th April 2013, the High Court in Kampala ordered eleven million Euros to be paid to the 2000 or so Ugandans who had been “brutally” evicted from their land to make way for a plantation.¹⁹⁵ The judgement was very condemnatory of the company:

¹⁸⁸ HRC (1) (2011) *op. cit.* (n.4) Section 3 Para A(25).

¹⁸⁹ Republic of Uganda (1) (1995), *op.cit.* (n.24), Article 50(1).

¹⁹⁰ Republic of Uganda (1) (1995), *op.cit.* (n.24), Article 128

¹⁹¹ Republic of Uganda (1) (1995), *op.cit.* (n.24), Article 137

¹⁹² Iain Clarkson, Antwerp, Belgium, 2012

¹⁹³ Danish Institute for Human Rights, *Access to Justice and Legal Aid in East Africa*, December 2011 (www.humanrights.dk/files/images/Publikationer/Legal_Aid_East_Africa_Dec_2011_DIHR_Study_Final.pdf).

¹⁹⁴ Business and Human Rights Resource Centre, *Annual Briefing : Corporate Accountability*, June 2012, (www.business-humanrights.org/media/documents/corporate-legal-accountability-annual-briefing-final-20-jun-2012.pdf), p.6.

¹⁹⁵ FIAN, *Ugandan court orders compensation be paid to evictees of the Kaweri-Coffee-Plantation* (Press Release), last updated 11 April 2013 (www.fian.org/news/article/detail/ugandan-court-orders-compensation-be-paid-to-evictees-of-the-kaweri-coffee-plantation/).

*The German investors had a duty to ensure that our indigenous people were not exploited. They should have respected the human rights and values of people and as honorable businessm[e]n and investors they should have not moved into the lands unless they had satisfied themselves that the tenants were properly compensated, relocated and adequate notice was given to them.*¹⁹⁶

Civil procedures and “public interest litigation” against large companies can be very powerful, provided hurdles such as jurisdiction are overcome. For example, the Center for Public Interest Law (CEPIL) filed a complaint in Tema High Court in Ghana against Tema Oil in 2007. The suit was over a spill at the company’s refinery that polluted Chemu Lagoon, which harmed those who depend on the lagoon for food and livelihood. Tema Oil requested that the court dismiss the case, as the CEPIL did not have standing to bring the lawsuit on behalf of the affected population. However the judge denied this motion to dismiss. The judge asserted that “public interest litigation” seems to be a new concept in our jurisprudence and it ought...to be encouraged. I believe it is an antidote to the problem of direct victims...being unable to take such cases to court.”¹⁹⁷

Bringing criminal cases against a company in Uganda may also be part of the route towards remedy. A positive development in this regard is that Uganda’s revised 2012 Companies Act allows the High Court to prosecute individuals within a company for tax evasion and fraud by “lifting the corporate veil”.¹⁹⁸

The Business and Human Rights Resource Centre (BHRRC) recently reported that there is an increasing effort to litigate cases in host states (the country where harm has occurred) through bringing lawsuits to national courts and applying domestic law to hold companies accountable for human rights abuses. This trend is generally in the Global South – where more severe cases of corporate human rights abuse are likely to occur. Given the above-mentioned cases against Rolling Stone and Newman Kaffee Gruppe, there is every chance that Uganda’s High Courts will continue to defend human rights against business interests.

Yet BHRRC also report that, “despite this increase, these lawsuits remain rare, due to many obstacles in host states, including jurisdictional barriers, financial and other resource constraints, and in some countries weak rule of law... Practical barriers often keep victims from accessing remedies. It is difficult to find a lawyer who can bear the cost, and these lawsuits are often drawn-out, complex affairs lasting more than a decade.”¹⁹⁹

Likewise the Guiding Principles highlight that legal barriers often prevent legitimate cases from being addressed. Legal responsibility may facilitate the avoidance of accountability within corporate groups for example, or claimants may be denied access to courts. In certain courts people such as indigenous peoples, migrants and women, may be excluded from the average national level of legal protection, or left out of processes. Costs of claims may be too high, legal representation may be hard to find, or States may lack adequate resources.

Like many countries, Uganda’s issues with remedy mainly lie, not in the content of their laws, but in enforcement of law, access to justice, and implementation of judicial decisions. Solomon Weberali of Street Law Uganda, a non-profit organisation with a focus on legal education, highlighted some of these issues

Firstly, using the courts can take a very long time. Mr. Weberali explained that a simple matter can take years to be heard, within congested courts, resulting in a frustrating and unattractive process. Courts are congested and there are enormous case backlogs. This is due to several factors, most notably that legal sector personnel, especially paralegals, lack the necessary training.²⁰⁰ Courts may also lack predictability in following up cases, for example in ensuring that compensation has been paid.

¹⁹⁶ Baleke Kayira & 4 Ors v Attorney General & 2 Ors. [2002] UGHC 52, Civil Suit No 179, (www.ulii.org/ug/judgment/high-court/2013/52).

¹⁹⁷ Center for Public Interest Law and Anor vs. Tema Oil Refinery [2007] Suit No. E12/91/07 (cepil.org.gh/file/CEPILvs.%20TOR.pdf).

¹⁹⁸ The Republic of Uganda (10), (2012) *op.cit.* (n.114), Para 20.

¹⁹⁹ BHRRC, 2012, *op.cit.* (n.194).

²⁰⁰ Danish Institute for Human Rights, based on a cooperation with the East Africa Law Society, December 2011, *Access to Justice and Legal Aid in East Africa. A comparison of the legal aid schemes used in the region and the level of cooperation and coordination between the various actors*, (www.humanrights.dk/files/images/Publikationer/Legal_Aid_East_Africa_

Secondly, many Ugandans lack knowledge of the legal system. Without access to recourse being publicised, aggrieved parties cannot come forward to claim their rights. Various non-governmental organisations publicise these services, but it still seems the state has not done enough to ensure that Ugandans are familiar with their court system.

The Danish Institute for Human Rights (DIHR) report that poverty also constitutes a significant obstacle for access to the formal justice system,

*"[...] both because it is connected to ignorance of the law and because many people cannot afford legal assistance and representation or cover the costs related to transport, user fees or even bribery. This also has to do with the fact that despite the current efforts to decentralise justice, "geographical distribution and proximity of justice delivery" remains a problem. In particular, conflict affected areas such as northern Uganda suffer from these problems, and the failure to implement in such areas the reforms currently underway.*²⁰¹

Legal aid should fill this gap, and many organisations work hard to ensure that access is possible.²⁰² However, the DIHR also reports that there might be a lack of willingness on the part of some legal aid providers to promote access to justice. They note that in Uganda, the legal profession is often seen as a business rather than as a means to enable others to access justice and, as a result, lawyers treat it as such.²⁰³

Lastly, DIHR also report that "corruption and political interference to some extent continue to obstruct judicial independence and fair justice."²⁰⁴

Nevertheless, there have been some changes in the judicial system over the past years that have been very positive, including for example, the creation of additional courts, and the availability of information online. Through reforms, the system has continued to develop in a positive direction.

In addition to civil and criminal procedures, Ugandans might be able to claim justice through other part of their judicial system. For example, Uganda's Commercial Court, a division of Uganda's High Court, was developed in 1996 to deal with the complex disputes that arise in business, and to do so speedily, as a reaction to the previous year's Justice Platt Commission of Enquiry Report on "Delays in the Judicial System."²⁰⁵ Although not fully operational yet, the Industrial Court offers an avenue for individuals, Labour Unions and employers to pursue justice.²⁰⁶ The Court was established under the Trade Disputes (Arbitration & Settlement) Act of 1964. Its speedy full establishment would be an exceptionally useful step towards ensuring justice for a large number of human rights risks at the hands of businesses in Uganda.

An oil tribunal in Uganda is an option that would specifically deal with issues relating to oil extraction or production, potentially even only in the oil region. The value of such a mechanism is lies in the specific nature of many of the issues relating to oil industry (land, environment, resettlement etc.). However there is no mention of this in the oil laws, and it seems likely that the government would prefer to mainstream the oil industry as much as possible, rather than separating it into its own legal sphere.

Whilst ensuring that access to remedy is covered by relevant court, the Government of Uganda should also ensure that a number of more practical issues create barriers to justice. The UN Working Group on Business and Human Rights noted some of these barriers in their March 2013 report to the UN Human Rights Council. These include: the cost of seeking judicial remedy; the lack of resources and legal aid available to victims; the complexity of corporate structures; difficulty in accessing information;

[Dec_2011_DIHR_Study_Final.pdf](#) p.33.

²⁰¹ *Ibid.*

²⁰² See Legal Aid Service Providers Network (LASPNET) (www.laspnet.org)

²⁰³ DIHR and EALS (2011) *op.cit.* (n.200), p.34.

²⁰⁴ DIHR and EALS (2011) *op.cit.*, (n.200). p.33.

²⁰⁵ Hon Justice B.J. Odoki, Chief Justice of Uganda, *The Relevance of Commercial Courts to the Modern Judiciary: A Case Study From Uganda*, The Southern African Chief Justices Forum Conference, August 2010 (www.venice.coe.int/SACJF/2010_08_RSA_Johannesburg/Uganda.pdf).

²⁰⁶ Ministry of Gender, Labour and Social Development, The Industrial Court, accessed 10 December 2012 (www.mglsd.go.ug/?p=711).

jurisdictional challenges; and difficulties in enforcing judgments.²⁰⁷ Those seeking legal remedy can also be subject to harassment, threats and intimidation. Some are subject to s “SLAPP” actions (strategic lawsuit against public participation). SLAPP lawsuits are “retaliatory lawsuits intended to silence, intimidate, or punish those who have used public forums”, and usually take the case of defamation or libel claims.²⁰⁸

Information box: The United Nations Working Group on Business and Human Rights

In June 2011, the UN Human Rights Council established a UN Working Group on business and human rights. One of the Working Group’s mandates is to “continue to explore options and make recommendations at the national, regional and international levels for enhancing access to effective remedies available to those whose human rights are affected by corporate activities”²⁰⁹

The Working Group’s methods consist of:

- a Chairperson-Rapporteur;
- country missions;
- field work;
- a multi-stakeholder, consultative and inclusive approach;
- to raise specific allegations that it determines to be particularly emblematic with relevant State authorities and companies, and request clarification or additional information as appropriate (though it is not generally in a position to address individual cases of alleged business-related human rights abuse);
- a Forum on Business and Human Rights;
- reporting and strategy.

The Business and Human Rights Resource Centre has a portal on the Working Group,²¹⁰ where it is possible to keep up with their latest developments, and specifically recent analyses on Uganda.

²⁰⁷ UN Human Rights Council (3), Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, 14 March 2013, *UN Doc: A/HRC/23/32*.

²⁰⁸ The Free Dictionary, *Strategic Lawsuits against Public Participation*, last accessed 10 December 2013, ([legal-dictionary.thefreedictionary.com/Strategic+Lawsuits+against+Public+Participation](http://thefreedictionary.com/Strategic+Lawsuits+against+Public+Participation)).

²⁰⁹ BHRRC (2012) *op.cit.* (n.194). The rest of the mandate includes to: (a) promote the effective and comprehensive dissemination and implementation of the Guiding Principles [...] (b) identify, exchange and promote good practices and lessons learned on the implementation of the Guiding Principles and to assess and make recommendations thereon and, in that context, to seek and receive information from all relevant sources, including Governments, transnational corporations and other business enterprises, national human rights institutions, civil society and rights-holders; (c) provide support for efforts to promote capacity-building and the use of the Guiding Principles, as well as, upon request, to provide advice and recommendations regarding the development of domestic legislation and policies relating to business and human rights; (d) conduct country visits and to respond promptly to invitations from States; (e) continue to explore options and make recommendations at the national, regional and international levels for enhancing access to effective remedies available to those whose human rights are affected by corporate activities; (f) integrate a gender perspective throughout the work of the mandate and to give special attention to persons living in vulnerable situations, in particular children; (g) work in close cooperation and coordination with other relevant special procedures of the Human Rights Council, relevant United Nations and other international bodies, the treaty bodies and regional human rights organizations; (h) develop a regular dialogue and discuss possible areas of cooperation with Governments and all relevant actors, including relevant United Nations bodies, specialized agencies, funds and programmes [...] as well as transnational corporations and other business enterprises, national human rights institutions, representatives of indigenous peoples, civil society organizations and other regional and subregional international organizations; (i) guide the work of the Forum on Business and Human Rights; (j) report annually to the Human Rights Council and the General Assembly.

²¹⁰ BHRRC, *UN Working Group*, last accessed 10 December 2013 (www.business-humanrights.org/UNWorkingGroupPortal/Home).

State-based non-judicial mechanisms

Aside from judicial mechanisms, the State should also provide “effective and appropriate” *non-judicial* grievance mechanisms. These can be mediation-based, adjudicative, or follow more long-held, traditional procedures.

National human rights institutions are particularly significant mechanisms for recourse in this regard. The Ugandan Human Rights Commission (UHRC) has a strong presence in Uganda, and this includes the power to investigate. They may summon or order any person to attend before them, and demand the production of any relevant documents or records that could assist an investigation.²¹¹

The UHRC is actively engaged in business issues, stating:

*“NHRI’s are potentially important avenues at the national level for remedying cases of human rights allegations involving corporations. NHRI’s play a major role in monitoring and reporting of human rights abuses in the business sector, facilitating legal reforms, building capacity of government institutions as well as working with private sector enterprises in the promotion and protection of human rights.”*²¹²



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Furthermore, the UHRC has quasi-judicial powers that include the right to recommend compensation to victims or members of their family.²¹³ Along with the Indian National Human Rights Commission, the UHRC is one of the only NHRIs vested with the power (albeit limited) of a civil court, in that, under section 53(2) of the Constitution, “in case of infringement of human rights, [the UHRC] can order the release of a detained person, payment of compensation or any other legal remedy or redress. Section 53(3) provides that orders made by the Commission can be appealed to the High Court.”²¹⁴

UHRC fact finding involves “writing to the respondents asking them to give their side of the story; carrying out investigations which may involve field visits, calling for and examining documents related to the investigations, interviewing individuals and recording statements from witnesses.”²¹⁵ The UHRC has a mechanism for handling complaints and promotes other measures such as legal education, encouraging the State or companies to set up funds for redress, and so on. It states that anyone should be able to bring a complaint forward about a private or public company, from individuals to groups, victims to simply concerned parties.

²¹¹ Republic of Uganda (1) (1995), *op. cit.* (n.24), Article 53(1).

²¹² Kaggawa, M.S.K, *Access to remedy for corporate human rights abuses*, Uganda Human Rights Commission, 2009.

²¹³ Lindsnaes, B, Lindholt, L and Yigen, K, “National Human Rights Institutions Articles and working papers: Input to the discussions on the establishment and development of the functions of national human rights institutions”, *Danish Centre for Human Rights*, 2000 (www.humanrights.dk/files/Importerede%20filer/hr/pdf/nhribook.pdf) p.29.

²¹⁴ *Ibid.*

²¹⁵ Kaggawa (2009), *op.cit.* (n.212), p.6.

The UHRC may become a good place to register complaints regarding corporate related human rights concerns. NHRIs in particular are noted for their ability to solve issues through mediation, lightening the burden on courts, and UHRC is no exception. It states that:

*"...the Uganda Human Rights Commission mostly uses mediation to resolve the labour complaints it receives. The mediation process normally results in the signing of memorandum of understanding between the parties to the complaint stipulating the remedy or redress to be given to the victim, including monetary compensation; apology; and re-instatement to work in case of wrongful or unfair dismissal."*²¹⁶

The UHRC reports that they follow up memoranda of understanding to assess if they are being properly implemented or not, and can also follow up on the progress of complaints referred to other bodies for better management.

As a side note, NHRIs also offer the opportunity to link between international and national levels. They are aware of local- and situation-specific issues, but represent human rights at a global level through NHRI conferences and similar initiatives.²¹⁷ The UHRC also recommends a proactive approach to improving the role of NHRIs in enabling access to non-judicial remedies, "including raising awareness of workers, communities and companies on the complaint mechanisms by NHRI's, systematically identifying and targeting repeated abuses and violations, and conducting systemic investigations of systemic complaints using litigation and legal aid."²¹⁸

Lastly, the Ugandan State should look into the utility of arranging locally based grievance mechanism procedures, specifically around oil sites. Holding a company accountable for grave human rights abuses through traditional justice procedures might not be appropriate. However given these mechanisms' sustainability, buy-in, and cultural appropriateness, they might offer an interesting avenue by which to at least gather evidence and liberate voices. Such approaches could well be more acceptable to the host communities, as their participation would create a sense of ownership for any eventual remedies.

The Guiding Principles advocate for **operational-level grievance mechanisms** occur at the ground/operational level. These are businesses-run initiatives that enable the quick and accurate registration of local grievances. The third paper in this series will look at these mechanisms in detail, as they are a core part of businesses' provision to enable access to remedies.²¹⁹

State facilitation of non-State-based grievance mechanisms

The Guiding Principles point out the virtues of regional and international human rights bodies: "these have dealt most often with alleged violations by States of their obligations to respect human rights. However, some have also dealt with the failure of a State to meet its duty to protect against human rights abuse by business enterprises."

The African Commission on Human and People's Rights (ACHPR), and the African Court on Human and People's Rights are key bodies for regional access to remedy for Ugandan citizens. The Commission is can receive petitions from individuals or NGOs, irrespective of whether they are the direct victims of the violation complained of. The Commissions' firm and dynamic response to a communication regarding the human rights of the Ogoni People in Nigeria has received praise from the international community.²²⁰

The African Court on Human and People's Rights has historically dealt with cases against States and has touched on the States' failures to protect against business enterprises. In the case of natural resources, it can often be the case that States act as agents on behalf of companies, by clearing land on their behalf.

²¹⁶ Kaggawa (2009), *op.cit.*, (n.2012), p.7. N.B. The UHRC also recommends that approach the Labour Office can also be a useful, or sometimes even more effective, way to seek management of come claims.

²¹⁷ Kaggawa (2009), *op.cit.* (n.212), p.2.

²¹⁸ Kaggawa (2009), *op.cit.* (n.212), p.5.

²¹⁹ Wass G and Musiime C, *Respect and Remedy: Implementing corporate responsibility under the UN Framework on Business and Human Rights*, IPIS Research and ActionAid International Uganda, tbc.

²²⁰ Coomans F, 'The Ogoni Case Before The African Commission on Human and Peoples' Rights', *International and Comparative Law Quarterly*, Volume 52, Issue 03, July 2003, pp. 749-760.

For example, the Court is in the process of hearing a case on behalf of the indigenous Ogiek community of Kenya regarding increasingly destructive displacement.²²¹

An increasingly useful and used avenue of recourse can be through National Contact Points (NCPs) of the Organization for Economic Co-operation and Development (OECD). The OECD has published *Guidelines for Multinational Enterprises*, which provide non-binding principles and standards for responsible international business conduct.

Where there is an allegation that a company has not conducted its operations in compliance with the OECD guidelines, the case can be brought to the NCP headquartered in an OECD country or another country adhering to the Guidelines.

Uganda is not a participant of the OECD. However since 2000, the Guidelines have been applicable to companies from the countries that are members of the OECD or have signed the OECD's Declaration on International Investment and Multinational Enterprises. Therefore France²²² and the UK²²³, who are participants, can receive complaints.

This mechanism was used to lodge a complaint to the German NCP in 2009 by Wake Up and Fights for Your Rights, Madudu Group supported by FIAN regarding forced evictions involving the Neumann Kaffee Gruppe in Uganda (described on p.20).

The International Labour Organization's (ILO) Tripartite Declaration²²⁴ also recommends that multinational and national enterprises should establish voluntary conciliation machinery to assist in the prevention and settlement of industrial disputes between employers and workers.

Aggrieved parties may also often find themselves seeking the help of organisations such as the Office of the High Commissioner of Human Rights (OHCHR), or NGOs such as the Ugandan Human Rights Center or the Foundation for Human Rights Initiative (FHRI). The FHRI, for example, offers alternative dispute resolution.²²⁵ Such services are vital for enabling access to legal aid and advice for those who are not otherwise able to access the justice system.

Other avenues for remedy will be covered in the final paper in this series - *Civil Society: Holding the State and businesses to account*, to be published in 2014, however the above has offered some key examples. The material point is that Uganda should recognise the complementary benefits of such non-State mechanisms, and take steps to promote and enable access to them for Ugandan citizens.

Moreover, limited access to remedy – i.e. the “Third Pillar” of the Framework on Business and Human Rights – is a matter of grave concern. Internationally, despite States engaging with the business and human rights agenda and releasing National Action Plans, many actors remain troubled by the persistent lack of access to remedy for victims of human rights abuses by businesses. In the UN's Second Forum on Business and Human Rights in Geneva, November 2013, this was consistently highlighted as a pressing issue. A binding statute for an international court for corporate wrongdoings was proposed as an urgent solution. Uganda should consider where they might fit into the process of the international community (specifically the UN) establishing such a court, and specifically reflect on the benefits it would bring to Ugandan citizens who may be vulnerable to relevant human rights abuses.

²²¹ Purvis C, 'Displacement and Resistance: The Ogiek of Kenya', *Think Africa Press*, 22 March 2013, (thinkafricapress.com/kenya/mau-ogiek-displacement).

²²² Trésor, *Le Point de contact national (PCN)*, last accessed 10 December 2013 (www.tresor.economie.gouv.fr/3623_le-point-de-contact-national-pcn)

²²³ Department for Business, Innovation and Skills, *UK National Contact Point for the Organisation for Economic Co-operation and Development (OECD) guidelines for multinational enterprises*, (www.gov.uk/uk-national-contact-point-for-the-organisation-for-economic-co-operation-and-development-oecd-guidelines-for-multinational-enterprises)

²²⁴ International Labour Organisation, *Tripartite Declaration of Principles concerning multinational enterprises and social policy – 4th edition*, 1 January 2006.

²²⁵ Foundation for Human Rights Initiative, *Legal Services*, last accessed 10 December 2013 (www.fhri.or.ug/index.php/joomla/legal-services1.html).

UN Guiding Principle: The Home States' Duty to Ensure Human Rights Protection from the Adverse Impacts of Business Activity, and Facilitate Access to Effective Remedy

In addition to Uganda's obligations towards human rights in the country, some responsibility arguably falls upon the "home" State of the companies operating there - Britain (Tullow), France (Total) and China (CNOOC).²²⁶

The specific definition of home States in the Guiding Principles is left open. Essentially, the home State is the *nationality* of the transnational corporation. Under public international law, this is generally the country in which a business has been incorporated (i.e. legally formed into an entity that is separate from its owners / shareholders) or the country from which control over the corporation's activities is primarily exercised.²²⁷

The Guiding Principles do not describe a definite division between the responsibilities of host states and home states²²⁸, although the host state responsibility is clearly primary. However some nuances of the Guiding Principles are open to interpretation (especially with regards to which Principles fall on *both* host and home states) and, accompanied by current legal analysis of the extraterritorial obligations of states, mounting arguments stress the role of home states towards protection of human rights against their businesses abroad.

Extraterritorial obligations have their root in international law. At the treaty level, the International Covenant on Civil and Political Rights (ICCPR) Article 2(1) reads,

*"Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and **subject to its jurisdiction** the rights recognized in the present Covenant..."*²²⁹

The Human Rights Committee - the body of independent experts that monitors implementation of the ICCPR - is mandated to interpret various provisions of the ICCPR. In this capacity the HRC has offered interpretation of the meaning of "jurisdiction" in Article 2(1). In their General Comment 31, referring to Article 2(1) the Human Rights Committee stated, "[States' requirement to respect and ensure the Covenant rights to all persons subject to their jurisdiction] means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party."²³⁰

The Human Rights Committee's clarification was necessary because of a long-standing, widespread legal understanding of jurisdiction as territorial – i.e. that states owe their rights obligations primarily to those within their territory. Yet the circumstances of the globalised world we now live in, and the reality that States do not solely affect rights within their borders have rendered this conception of jurisdiction somewhat "inadequate".²³¹

Based on the argument of the extraterritorial obligation of States towards human rights, there is a growing school of thought that has now been epitomised in the Maastricht Principles.²³² These Principles

²²⁶ Iain Clarkson, Antwerp, Belgium, 2012.

²²⁷ SL Seck, 'Conceptualizing the Home State Duty to Protect Human Rights' in K Buhmann, L Roseberry and M Morsing (eds), *Corporate Social and Human Rights Responsibilities: Global, Legal and Management Perspectives* (Palgrave Macmillan 2010). p.28.

²²⁸ Vandenhole, W, Contextualising The State Duty To Protect Human Rights As Defined In The UN Guiding Principles On Business And Human Rights, *Revista de Estudios Jurídicos no 12/2012* (Segunda Época), Universidad de Jaén.

²²⁹ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

²³⁰ UN Human Rights Committee (HRC), *General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, Para 10.

²³¹ King, H, 'The Extraterritorial Human Rights Obligations of States' 9 *Hum. Rts. L. Rev.* 521 2009 p. 3

²³² ETO Consortium, *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, January 2013.

have been drawn from existing international case law and principles, and extrapolated by a group of international legal experts. These experts included (then) current and former members of international human rights treaty bodies, regional human rights bodies, and Special Rapporteurs of the United Nations Human Rights Council.

The scope of State jurisdiction with regards to human rights was a key point that the Maastricht Principles sought to clarify,

“A State has obligations to respect, protect and fulfil economic, social and cultural rights in any of the following:

- a. Situations over which it exercises authority or effective control, whether or not such control is exercised in accordance with international law;
- b. Situations over which State acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights, whether within or outside its territory;
- c. Situations in which the State, acting separately or jointly, whether through its executive, legislative or judicial branches, is in a position to exercise decisive influence or to take measures to realize economic, social and cultural rights extraterritorially, in accordance with international law.”²³³

In short, home states have two overarching obligations relevant to corporate activities abroad. Firstly, they must regulate corporations with the aim of ensuring they do not commit human rights abuses abroad. Secondly, they must provide access to effective remedies to the victims of any such abuses that do occur.²³⁴

UN treaty bodies have increasingly held States accountable to their extra-territorial obligations. For example, the Human Rights Committee has examined forced evictions which were carried out in 2001 in the villages of Kitemba, Luwunga, Kijunga and Kirymakole in the Mubende District of Uganda. The evictions were carried out on behalf of the German business *Neumann Kaffee Gruppe* to make way for a coffee plantation.²³⁵

In their Concluding Observations, the Human Rights Committee stressed that Germany was encouraged to set out the expectation that all business enterprises *domiciled in their jurisdiction* respect human rights standards, and that remedies for victims abroad should be strengthened.²³⁶ Bret Thiele, Co-Executive Director of the Global Initiative for Economic, Social and Cultural Rights, has explained that, “With these clear pronouncements, the Human Rights Committee made clear the extra-territorial scope of human rights obligations under the International Covenant on Civil and Political Rights.”²³⁷

The Guiding Principles acknowledge incorporate this trend by directly discussing domestic measures with extraterritorial implications and discussing examples of approaches that may be taken:

- Requirements on “parent” companies to report on the global operations of the entire enterprise;
- Multilateral soft-law instruments such as the Guidelines for Multinational Enterprises of the Organization for Economic Cooperation and Development;
- Performance standards required by institutions that support overseas investments.
- Direct extraterritorial legislation and enforcement, including criminal regimes that allow for prosecutions based on the nationality of the perpetrator no matter where the offence occurs.²³⁸

²³³ *Ibid.*

²³⁴ *Ibid.* e.gg, Principles 24, 25, 36, 37 and 38.

²³⁵ Global Initiative for Economic, Social and Cultural Rights (GI-ESCR), *Human Rights Committee recognizes Extra-Territorial Obligations under the International Covenant on Civil and Political Rights*, last updated on 27 November 2012 (globalinitiative-escr.org/human-rights-committee-recognizes-extra-territorial-obligations-under-the-international-covenant-on-civil-and-political-rights/).

²³⁶ See, Human Rights Committee, Concluding Observations: Germany, *UN Doc. CCPR/C/DEU/CO/6* (12 November 2012) at para. 16.

²³⁷ GI-ESCR (2012) *op.cit.* (n.235).

²³⁸ HRC(1), (2012) *op.cit.* (n.6).

The following chapter will review some of the most relevant and useful measures that the home States of oil companies in Uganda could take to protect the human rights of Ugandans affected by these businesses' operations.

Setting expectations and providing guidance to businesses

At a minimum, States should implement their extraterritorial obligations by clearly communicating to national companies the expectation that such companies should respect human rights in all of their activities, including activities abroad, and to offer relevant guidance to that effect.

OECD Guidelines for Multinational Enterprises

The OECD Guidelines for Multinational Enterprises define standards for socially and environmentally responsible corporate behaviour and proscribe procedures for resolving disputes between corporations and the communities or individuals negatively affected by corporate activities.²³⁹ The Guidelines are not binding upon companies, however signatory governments and the OECD are required to ensure that they are implemented and observed.

Notably, in 2011 the Guidelines were updated, introducing substantial new provisions in areas such as human rights, due diligence and supply chain responsibility. States that adopt these Guidelines therefore offer their businesses a clear map and explanation of rights-respectful behaviour abroad.

The UK and France are both members of the OECD and signatories to the Guidelines. This enables victims to access these countries' very effective grievance mechanisms, as described on p.45. China is not a member of the OECD, however it is possible for non-members to automatically become Guideline signatories if they sign the Investment Declaration with the OECD.

China has not signed up to the Declaration however, and is unlikely to, as doing so would entail a policy commitment to, among other things, improve their domestic investment climate for foreign companies.²⁴⁰ Moreover, Peter Bosshard, the Policy Director of International Rivers has stated, that although Brazil, Argentina and numerous other non OECD-countries have endorsed the OECD guidelines for their own companies, "China is not keen to follow norms that rich countries prepared without its involvement. The new guidelines add to the profusion of international norms, but Chinese enterprises may well take recommendations from their own government more seriously than OECD norms."²⁴¹ However, nothing prevents China from adopting identical or similar guidelines.

European Commission Guidelines

The European Commission's (EC's) *Oil and Gas Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights*²⁴² applies the Guiding Principles to the oil and gas sector in order to help companies "translate" respect for human rights into their own systems and company cultures.²⁴³ The Guide summarises what the Guiding Principles expect, offers a range of ideas and examples for how to put them into practice, and links the reader to further resources that can support their work. The Guide can be referred to as needed throughout the Guiding Principles integration process, and is intended to be a handbook and help, rather than overly specific or legally binding.²⁴⁴

As members of the EU, France and the UK automatically endorse the Oil and Gas Sector Guide. It is difficult to know the extent to which France and the UK directly approach major oil and gas players, to encourage them to implement these principles. However the UK has committed to encourage trade

²³⁹ OECD, *The OECD Guidelines for Multinational Enterprises*, accessed 3 December 2013.

²⁴⁰ Personal Correspondence, *SOMO and IPIS*, November 2013.

²⁴¹ Bosshard, P, 'Holding Chinese Investors to Account', *International Rivers*, last updated 23 April 2013 (www.internationalrivers.org/blogs/227/holding-chinese-investors-to-account).

²⁴² European Commission (authored by Shift and the Institute for Human Rights and Business), *Oil and Gas Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights*, 2013.

²⁴³ *Ibid.*

²⁴⁴ *Ibid.*

associations/sector groupings of companies to develop guidance, and pointed towards the EC's Oil and Gas Sector Guidance as guidance for such initiatives.²⁴⁵

State Guidance and National Human Rights Action Plans

Whereas regional and international frameworks' particular merit lies in their ability to raise the standard across a number of countries and promote coherence, the benefit of national promotion of and guidance on business and human rights is that it can be tailored to the specific needs of a given country. Moreover, handled by a particular State department, there can be designated space for interaction and collaboration between State and business. National endorsement of business and human rights can most effectively take place through national action plans.

In February 2013, China's Ministries of Commerce and Environmental Protection published, "Guidelines for Environmental Protection in Foreign Investment and Cooperation". The Guidelines are voluntary and target large State-owned enterprises (of which CNOOC is one).²⁴⁶ Commentators have stated that the guidelines are similar in substance to the environmental recommendations of the OECD Guidelines for Multinational Enterprises.

China has not yet prepared any guidelines on the human rights obligations of its overseas investors.²⁴⁷ However the environmental guideline signify engagement with corporate responsibility abroad, and human rights-oriented guidance could follow.

The UK has made the UNGPs a priority issue since 2011²⁴⁸ and, in 2013, released a national business and human rights action plan called "Good Business."²⁴⁹ Within the action plan, the UK outlines how the UNGPs apply to the government and UK businesses, and how the government will implement measures to integrate their duties under the UNGPs. Measures that the UK Government will take include improving access to remedy for victims of human rights abuses involving businesses enterprises within UK jurisdiction, promoting understanding of human rights to businesses, and ensuring policy consistency across the Government, and giving financial aid to the UN Global Compact.²⁵⁰

Within Uganda, the UK foreign office has put this into practice by funding training on the UN Guiding Principles for the Ugandan Human Rights Commission and others.²⁵¹ Although commendable, it remains questionable whether the UK are using resources to full effect. For example, in Uganda, the UK's the Foreign and Commonwealth Office (FCO) has a Trade arm (the UKTI) that offers advice to British businesses entering and operating in the Ugandan market. However the UKTI did not report that they had received any information from the UK government on advising UK businesses / providing UK businesses with methods to respect human rights. Their sole responsibility was to make "doing business" in Uganda easy for British companies.²⁵²

Advising businesses of human rights issues at this stage would be a simple but hugely effective way of sensitising companies to the specific human rights risks they might encounter when doing business in Uganda.

France is in the process of developing a National Action Plan on business and human rights. France's *La Commission nationale consultative des droits de l'homme* (CNCDH) has convened a working group to hear expert opinions on the matter and states that they intend to use those opinions to feed into an action plan.²⁵³

²⁴⁵ HM Government, *Good Business Implementing the UN Guiding Principles on Business and Human Rights*, September 2013.

²⁴⁶ Yan, K, 'Interview with Dr. Hu Tao on China's Overseas Investment Guidelines', *International Rivers*, 24 April 2013, (www.internationalrivers.org/resources/interview-with-dr-hu-tao-on-china-s-overseas-investment-guidelines-7944).

²⁴⁷ Bosshard, P, 'Holding Chinese Investors to Account', *International Rivers*, last updated 23 April 2013 (www.internationalrivers.org/blogs/227/holding-chinese-investors-to-account)

²⁴⁸ Interview, UK FCO in Uganda and IPIS, February 2013.

²⁴⁹ UK Government, (2013), op.cit. (n.245)

²⁵⁰ UK Government, (2013), op.cit. (n.245), p.7.

²⁵¹ Reference interview with PO from FCO

²⁵² Interview, UK FCO in Uganda and IPIS, February 2013.

²⁵³ CNCDH, *Entreprises et droits de l'homme : avis sur les enjeux de l'application par la France des Principes directeurs des Nations unies*, 24 October 2013, (www.cncdh.fr/sites/default/files/13.10.24_avis_entreprises_et_droits_de_lhomme_1.pdf).

The European Commission (EC) handles business and human rights under the broader title of Corporate Social Responsibility (CSR).²⁵⁴ Their definition of CSR is “the responsibility of enterprises for their impacts on society.”²⁵⁵ The EC has formulated a 2011-2014 Action Plan,²⁵⁶ which covers a number of activities ranging from further integrating CSR into education, training and research, and better aligning European and global approaches to CSR.

China does not appear to have a national action plan on business and human rights. However the State has taken steps to integrate CSR into law, policy and guidelines. The most prominent of these include: The Company law, enacted in 2006, The Labour Contract Law in 2008, The Instructions for CSR in State-Owned Enterprises issued in 2008 by the State-owned Assets Supervision and Administration Commission of the State Council, The Guidelines for CSR compliance for Foreign-Invested Enterprises issued in 2008 by the Chinese Academy of International Trade and Economic Cooperation.²⁵⁷

Specific guidance for ensuring that businesses are not involved with human rights abuse in conflict-affected areas

The Guiding Principles stress that where host states are unable to protect human rights due to a lack of effective control in conflict-affected areas, home States have roles to play in assisting both corporations and host States. In order to enable this, home States should ensure policy coherence and close cooperation between relevant State agencies, develop early-warning indicators, and attach appropriate consequences to non-cooperative businesses. As with other human rights risks, regulation and enforcement should be reviewed, corporate liability explored, and human rights due diligence encouraged or even enforced.

As reviewed in Report One of this series, there is no current risk of intense conflict in Uganda. However border tensions and internal unrest are not impossible, and it is the companies’ home States’ responsibility to ensure that companies are adequately briefed and prepare to ensure that they do not become embroiled in human rights abuses. There are a number of steps the countries can take to ensure that they assist their corporations’ involvement with conflict abroad.

The Voluntary Principles on Security and Human Rights (VPs) were established in 2000. The VPs are a set of principles designed to guide companies in maintaining the safety and security of their operations within an operating framework that encourages respect for human rights.²⁵⁸ Governments that join the Voluntary Principles Initiative have the opportunity to engage in learning and joint problem-solving with other governments, extractive companies; and NGOs to address challenges related to security and human rights concerns in the extractive industry. At present, the UK is a participant government; France and China are not.

The OECD adopted a **Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones** in 2006. The tool aims to help companies that invest in countries where governments are unwilling or unable to assume their responsibilities. It poses a range of questions addressing risks and ethical dilemmas that companies are likely to face in weak governance zones. The tool complements the abovementioned OECD Guidelines for Multinational Enterprises and has been actively promoted by the UK in their Good Business plan. States can also establish their own systems for aiding businesses. For example, many countries actively promote the International Code of Conduct for Private Security Service Providers²⁵⁹ or offer companies a risk advice service on conflict-affected countries.²⁶⁰

²⁵⁴ European Commission, Enterprise and Industry, *Corporate Social Responsibility*, last accessed 10 December 2013 (ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/index_en.htm)

²⁵⁵ European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and The Committee Of The Regions: A renewed EU strategy 2011-14 for Corporate Social Responsibility*, 25 October 2011, (eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0681:FIN:EN:PDF), p.6.

²⁵⁶ *Ibid.* For the progress of the Action Plan, see: European Commission, *European Commission Communication on CSR 2011: Implementation table*, 31 October 2013.

²⁵⁷ Elaine Sio-ying Hui, ‘Corporate Social Responsibility Revisited: Can it address Chinese workers’ needs in a changing socio-economic context?’ *Asia Monitor Resource Centre*, (www.amrc.org.hk/node/1205).

²⁵⁸ Voluntary Principles on Security and Human Rights, 2000.

²⁵⁹ *International Code of Conduct for Private Security Service Providers*, last accessed 10 December 2013, (www.icoc-psp.org).

²⁶⁰ UK Trade and Investment, *Overseas Business Risk – Uganda*, 28 October 2013, (www.ukti.gov.uk/export/countries/africa/eastafrica/uganda/overseasbusinessrisk.html)

Exercising extraterritorial jurisdiction

Dr Jennifer Zerk, who contributed to the Harvard Corporate Social Responsibility Initiative to help inform Special Representative John Ruggie's mandate, describes extraterritorial jurisdiction as *"the ability of a state, via various legal, regulatory and judicial institutions, to exercise its authority over actors and activities outside its own territory."*²⁶¹

With regards to the obligation of States to protect human rights extraterritorially, the Guiding Principles take a guarded stance:

*"States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations... At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. **Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis.**"*²⁶²

Whereas the Guiding Principles encourage home States to set an expectation, and acknowledge the permissibility of regulating extraterritorial activities, the Maastricht Principles place a deeper responsibility on States,

Principle 24: Obligation to regulate

All States must take necessary measures to ensure that non-State actors which they are in a position to regulate, as set out in Principle 25, such as private individuals and organizations, and transnational corporations and other business enterprises, do not nullify or impair the enjoyment of economic, social and cultural rights...

The Maastricht Principles highlight that bases for protection include circumstances where (amongst others): the non-State actor has the nationality of the State concerned; where the corporation, or its parent or controlling company, has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities, in the State concerned; where there is a reasonable link between the State concerned and the conduct it seeks to regulate, and; where any conduct impairing economic, social and cultural rights constitutes a violation of a peremptory norm of international law. Regarding the latter, the Maastricht Principles state that, *"Where such a violation also constitutes a crime under international law, States must exercise universal jurisdiction over those bearing responsibility or lawfully transfer them to an appropriate jurisdiction."*²⁶³

Given that the Maastricht Principles advocate for the necessary (and therefore limited) regulation of transnational corporations and other business enterprises extraterritorially, and the Guiding Principles do not object to such regulation, this will be taken as the reasonable standard hereafter.

Placing direct requirements or prohibitions upon businesses may be the firmest way of protecting human rights against abuses. Here, States have may chose between and the.²⁶⁴

Some of the ways in which France, the UK and China are, and/or could, exercise extraterritorial jurisdiction follow. States may chose to pass domestic measures with extraterritorial implications. However it should be noted that States are limited in their ability to exercise of direct extraterritorial jurisdiction over private actors or activities abroad, as international law places limits on the use of direct extraterritorial jurisdiction. If doing so, it must be possible to rely on one or more established jurisdictional principles (e.g. relevant territorial connections, nationality connections etc.). Moreover, such jurisdiction must be "reasonable" - a vaguely defined concept in international legal discourse.²⁶⁵

²⁶¹ Zerk, J.A, 'Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas', *Corporate Social Responsibility Initiative Working Paper No.59*, June 2010, (www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_59_zerk.pdf), p. 13.

²⁶² HRC (2011), *op. cit.* (n.6). Author's emphasis.

²⁶³ ETO Consortium, (2013), *op.cit.* (n.232).

²⁶⁴ Zerk, (2010), *op.cit.* (n.264).p.5.

²⁶⁵ Zerk, (2010), *op.cit.* (n.264).

Financial reporting

Misspending or mismanaging of revenue from extractive industries is all too common, according to the civil society network, *Publish What You Pay*. For example, in 1999, Global Witness published 'A Crude Awakening' which exposed the apparent complicity of the oil and banking industries in the plundering of state assets during Angola's 40-year civil war.²⁶⁶ It appeared that multinationals' refusal to release financial information enabled this. Many other examples like this have resulted in widespread calls for transparency in the sector.

The previous sub-chapter (Transparency, freedom of information, and anti-corruption measures, p. 20) introduced the Extractive Industry Transparency Initiative (EITI). The UK and France have committed to implement to EITI and China has expressed support for it, however none of these three countries are currently registered implementers. If these three countries were members of the EITI, they would not (in being so) be required to disclose payments in Uganda, as the EITI standard refers to payments in the country where operations take place. However the EITI has stressed that, "[implementation] can be particularly useful if linked to other government efforts to facilitate discussions and information on the extractives sector. Some countries have decided to implement to demonstrate international or regional leadership by implementing a global standard that they can then persuade others to follow."²⁶⁷

The EITI has been complemented by landmark national and regional legislation to ensure financial transparency. Significantly, in April 2013, the EU agreed on new rules to require oil, gas, mining and logging companies to publish the payments they make for access to natural resources in all countries where they operate. All EU-listed or large privately owned oil, gas, mining and logging companies will be required to publish all payments over €100,000 to every country where they operate and for each extractive project.²⁶⁸ The new rules will enter into force following Council of the European Union's formal approval. Member states will have two years to integrate them into their national legislation.²⁶⁹

China has passed no similar legislation, however they are subject to a similar U.S. law that preceded the EU's. In August 2012, the U.S. finalised the implementing rules for Section 1504 of the Dodd-Frank Act (also called the 'Cardin-Lugar Amendment') that requires every oil, gas and mining company listed on U.S. stock exchanges to publish their payments to governments of over US\$100,000, and for each individual extraction project. As CNOOC is listed on the New York Stock exchange,²⁷⁰ it will be subject to these publishing requirements, as will Total.²⁷¹

Non-financial reporting

Non-financial reporting involves companies reporting on the social, environmental and human rights aspects of their activities.²⁷² It incurs competitive benefits for companies, whilst enabling the public to hold them accountable. The European Coalition for Corporate Justice (ECCJ) have explained that, without such reporting, it is difficult for affected people, the general public, consumers, investors, and the management of these companies to understand the scope and impact of their corporate operations on society.²⁷³

²⁶⁶ Global Witness, *A Crude Awakening*, 1 December 1999.

²⁶⁷ EITI, *FAQ for Countries Considering the EITI*, last accessed 10 December 2013, (eiti.org/eiti/faq-countries-considering-eiti).

²⁶⁸ European Commission, *Revised Directive on transparency requirements for listed companies (Transparency Directive) – frequently asked questions*, European Commission - MEMO/13/544, 12 June 2013.

²⁶⁹ European Parliament News, *Oil, gas, mineral and logging firms obliged to disclose payments to governments*, 12 June 2013, (www.europarl.europa.eu/news/en/news-room/content/20130607IPR11387/html/Oil-gas-mineral-and-logging-firms-obliged-to-disclose-payments-to-governments).

²⁷⁰ NYSE Euronext, *CNOOC Limited*, last accessed 10 December 2013, (www.nyse.com/about/listed/lcddata.html?ticker=CEO).

²⁷¹ For more details on how reports may or may not be made public, and explanation of the added benefit of implementing the EITI, see: Stuesson, A, 'Global transparency efforts will affect oil companies in Uganda', *Oil in Uganda*, last updated 31 July 2013, (www.oilinuganda.org/features/companies/global-transparency-efforts-will-affect-oil-companies-in-uganda.html#more-3254).

²⁷² Access Info, *Access Info and ECCJ call for a strong EU position on corporate non financial reporting*, 18 July 2013, (www.access-info.org/en/business-transparency/470-corporate-non-financial-reporting).

²⁷³ European Coalition for Corporate Justice, *EU legislation on non-financial reporting by companies: Position Paper of the European Coalition for Corporate Justice*, last accessed 10 December 2013, (www.corporatejustice.org/IMG/pdf/position_paper_final-2.pdf).

In April 2013 the European Commission (EC) adopted a proposal for a Directive to improve the transparency of certain large companies on social and environmental issues via disclosure requirements on policies, risks and results. Included companies are those with over 500 employees: around 18,000 companies will be affected.

Affected companies would be required to disclose in their annual reports relevant and material information on social and employee-related matters, human rights, anti-corruption and bribery, and diversity on boards of directors.²⁷⁴ The EC has affirmed that disclosure requirements would be flexible and could follow such existing guidelines as the UN Global Compact, ISO 26000, or the German Sustainability Code.²⁷⁵ Both the UK and France have adopted relevant legislation; the UK in 2006, updated in July 2013 (currently in process)²⁷⁶ and France in 2012.²⁷⁷

In China, non-financial reporting is also on the rise. In May 2011, China's State-Owned Assets and Administration Commission (SASAC) mandated that all Chinese State-Owned Companies should publish an annual corporate social responsibility report.²⁷⁸ Moreover, bodies such as the ShenZhen Stock Exchange, the Chinese Securities Regulatory Commission, the Ministry of Commerce respectively require and encourage companies to disclose responsibly and sustainability information.

Human Rights Due Diligence

Section One's chapter on Laws governing corporate creation, investment, governance, and behaviour introduced the concept of due diligence as a means by which business enterprises can identify, prevent, mitigate and account for the harms they may cause, and through which judicial and regulatory bodies can assess an enterprise's respect for human rights.

In the previous section, Uganda's options for requiring human rights due diligence were discussed. These included taking elements from existing examples: the US' Dodd Frank and the EU's FLEGT legislations. These have shown that States have a capacity to put in place such measures, and the following years will show how useful they prove to be in safeguarding and promoting respect for human rights. Increasingly, due diligence may also be used in judicial processes, to prove (or, indeed, contradict) the claims companies' may make that they have taken steps to respect human rights.

National Action Plans on business and human rights should typically include the recommendation to businesses that human rights due diligence should be adopted. However in terms of legislation, countries are slow to make the practice mandatory for their large and multinational companies. China, the UK and France should all review how human rights could concretely benefit from such concrete measures.

Litigation

Violation of particular extraterritorial regulations can constitute a criminal offence. Key examples include prosecution of nationals for child sex offences committed abroad and anti-bribery laws. Furthermore, in order to comply with the requirements under international law (e.g. international humanitarian law, the Convention against Torture, and the Rome Statute of the International Criminal Court) a number of States have included provisions allowing for the investigation and prosecution of international crimes in their (domestic) criminal legislation, even when such crimes are committed outside their national territory, and regardless of the nationality of the perpetrators or the victims.²⁷⁹

²⁷⁴ European Commission, *Non-Financial Reporting*, last accessed 15 December 2013, (ec.europa.eu/internal_market/accounting/non-financial_reporting)

²⁷⁵ European Commission, (2013), *op.cit.* (n.268).

²⁷⁶ Global Reporting Initiative, *New reforms strengthen non-financial reporting in the UK*, 22 August 2013 (www.globalreporting.org/information/news-and-press-center/Pages/New-reforms-strengthen-non-financial-reporting-in-the-UK.aspx)

²⁷⁷ Ernst and Young, *How France's new sustainability reporting law impacts US companies*, 2012 ([www.ey.com/Publication/vwLUAssets/Frances_sustainability_law_to_impact_US_companies/\\$FILE/How_Frances_new_sustainability_reporting_law.pdf](http://www.ey.com/Publication/vwLUAssets/Frances_sustainability_law_to_impact_US_companies/$FILE/How_Frances_new_sustainability_reporting_law.pdf))

²⁷⁸ Wang, C, *Blog: The Rise of Reporting in China: How State-Owned Companies Can Dig Deeper*, Business for Social Responsibility, 28 January 2013, (www.bsr.org/en/our-insights/blog-view/the-rise-of-reporting-in-china-how-state-owned-companies-can-dig-deeper).

²⁷⁹ De Schutter et al. (2012), *op. cit.* (n.129), p.2.

An illustrative example of extraterritorial criminal jurisdiction is the power of the UK Bribery Act of 2010.²⁸⁰ Under this Act, a company can breach Section Seven by failing to prevent bribery. An employee, subsidiary, agent or service provider may bribe another person anywhere in the world to obtain or retain business or a business advantage. If a subsidiary, to be liable, the accused would have committed an act of bribery in the context of performing services for the UK parent.²⁸¹ In order for a company to defend themselves against liability, they would have to prove that they had 'adequate procedures' in place to prevent bribery.²⁸² Both individuals and companies can be prosecuted in UK Courts under the Act. Individuals can face up to 10 years in prison. Companies face unlimited fines. Either the UK Serious Fraud Office or the Crown Prosecution Service can prosecute companies and individuals.

Civil law suits can also be brought against companies. For example, in July 2013 a group of 12 Tanzanians filed a lawsuit against African Barrick Gold in UK High Court, alleging that the company was complicit in killings and injuries of villagers by police at the North Mara Mine in Tanzania.²⁸³

Other judicial avenues can also be explored, such as employment tribunals. In 2007 over 800 former workers at COMILOG – a Gabonese mining firm – brought a complaint before a French employment tribunal alleging unfair dismissal and requesting €65 million in compensation. In 1991 COMILOG laid off 955 workers without notice or compensation. A French firm – ERAMET – subsequently became a majority owner of COMILOG. In June 2013 the Paris Court of Appeal ruled that French courts have jurisdiction to hear a case regarding the COMILOG.²⁸⁴

Issues encountered when exercising extraterritoriality

When States' chose to extend their jurisdiction extraterritorially, they can be subject to controversy and criticism. Territorial sovereignty – the idea that every state should be able to regulate activities within its own territory in accordance with its own policies and priorities – lies at the heart of international law.²⁸⁵ Some States therefore oppose the extraterritorial jurisdiction of others on the grounds that it constitutes interference in their own domestic affairs, including their ability to implement their own policy choices.²⁸⁶ Meanwhile companies oppose State measures to regulate extraterritorially due to the perceived extra risk, uncertainty, and expense that it may create.²⁸⁷

However when States chose lighter methods, such as simply advising businesses, they can be met with defiance. For example, the UK oil company SOCO has continued operations in the DRC's Virunga Park – a World Heritage Site – despite the EU, the UK government, Belgian politicians, and the German government, expressing sincere apprehension over the sanctity of the park.²⁸⁸

Seeking remedy extraterritorially also renders unique, complex procedural challenges and barriers to justice. These include Courts refusing to take cases under the justification of *forum non conveniens*. Under this principle, Courts bring into question whether there is a 'more appropriate forum' for the trial than the MNC home court in which the ends of justice can be served.²⁸⁹ The "corporate veil" also remains at times impenetrable. The corporate veil exists due to companies (of certain types) having a separate legal personality. Shareholders (those who own the company) are protected by this veil. It is hard for

²⁸⁰ Legislation.Gov.UK, *UK Bribery Act*, 2010.

²⁸¹ *Ibid.*

²⁸² Wilkinson, P, 'Adequate Procedures - Guidance to the UK Bribery Act 2010', *Transparency International*, June 2010, p.7.

²⁸³ Business and Human Rights Resource Centre, *Annual Briefing: Corporate Legal Accountability*, November 213 (www.business-humanrights.org/media/documents/corp-legal-acc-annual-briefing-final-nov-2013.pdf), p.8.

²⁸⁴ *Ibid.*

²⁸⁵ Zerk J, (2010), *op.cit.* (n.264). p.5

²⁸⁶ Zerk, J (2010), *op.cit.* (n.264).

²⁸⁷ Zerk J (2010), *op.cit.* (n.264).

²⁸⁸ Wass G, *IPIS Insights: Why businesses should assess human rights impacts from the outset of projects SOCO International Oil Company in Virunga National Park, DRC*, IPIS Research, August 2013.

²⁸⁹ Meeran, R, Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States, *City University of Hong Kong Law Review* Volume 3:1 Fall 2011, pp 1–41.

courts to pierce the veil in order to hold a director, shareholder or related company responsible for the actions of the corporation.²⁹⁰

When using criminal law, it can be particularly difficult to ensure that cases are admissible. A difficulty in convicting a company of a criminal offence is the incapacity of a non-sentient entity to be in possession of *mens rea* – essentially a dishonest or criminal mind – an essential ingredient of a criminal offence.²⁹¹

The UK, France and China should feel pressure from the international community to provide access to remedy for the victims of their corporations' wrongdoing. In September 2013 John Ruggie stated, at the launch of the UK Government's "Action Plan" for implementing the UN Guiding Principles on business and human rights:²⁹²

"The UN Guiding Principles...stress the importance of states taking appropriate steps to reduce legal, practical and other relevant barriers that could lead to denial of access to remedy...The international community no longer regards sovereignty as a legitimate shield behind which egregious human rights violations can take place with impunity; surely the same must be true of the corporate form."

²⁹⁰ Nickleson R and Howie E, *The Impact of the Corporate Form on Corporate Liability for International Crimes: Separate Legal Personality, Limited Liability and the Corporate Veil – An Australian Law Perspective*, under Allens Arthur Robinson, Melbourne, Australia, 9 February 2007.

²⁹¹ Powles, S Mesquita, R, Carver, J and Hermer, R, *A Comparative Survey of Private Sector Liability for Grave Violations of International Law in National Jurisdictions: United Kingdom*, 2004, (www.fafo.no/liabilities/UK.pdf), p.2.

²⁹² Ruggie J.G, *Remarks at UK Government Launch Action Plan for Implementing the UN Guiding Principles*, Institute of Directors, London, 4 September 2013.

Conclusions and Recommendations

This report has offered an overview of some of the key ways in which the States of Uganda, (and to a lesser extent) the UK, France, and China can use the United Nations Guiding Principles on Business and Human Rights (UNGPs) to guide the actions they should take to safeguard human rights against the adverse impacts of business activity.

The above analysis has shown that the UNGPs offer a useful framework to map out the actions that these four States can take to protect human rights and ensure access to remedy should abuses occur. The steps that each State can take are unique and specific to each context.

However the UNGPs themselves are not without criticism. The UN Human Rights Council's 2nd Annual Forum on Business and Human Rights in Geneva, December 2013, saw hope, but also great frustration, at the impact of the Guiding Principles on the ground. These frustrations included the UNGP's non-binding nature, lack of implementation by States especially in ensuring access to remedy, and the lack of an internationally binding instrument to hold companies to account. In short, many feel that there is a long road still to travel.

As a result, although implementation of the recommendations offered in this paper would contribute to a better relationship between business and human rights in Uganda, the options offered are by no means comprehensive. In addition to the individual actions States take, there are many international, cooperative measures that States should consider to end the impunity of corporations and close the regulatory and remedial gaps that persist and enable the abuse of human rights by businesses. Moreover, as the following two papers will outline, businesses themselves have a significant role to play, as do civil society organisations and the citizens of Uganda.

The following years are vital in Uganda's human rights trajectory. Oil production will inevitably change Uganda's social, political and economic landscape. This can be for the better, but only within the context of a country that demonstrably prioritises the rights of its citizens. Friends of Uganda – especially the UK, France and China – should recognise the duty they have to ensure that businesses, as units of their societies, contribute to a positive future for the country.

This report closes by summarising the topics covered by this report, specifically covering the “smart mix” of measures – both voluntary and mandatory – that the States of Uganda, the UK, France and China should take to enable a positive relationship between human rights and businesses involved in the oil sector in Uganda.

The Republic of Uganda, with regard to the protection of human rights, is advised to:

- Implement measures to better communicate to businesses in Uganda the expectation that they should respect human rights. This should include: a National Action Plan on Business and Human Rights, based on multi-stakeholder consultation, and drawing upon the UN Guiding Principles on Business and Human Rights; and/or the inclusion of business and human rights issues into the National Action Plan on Human Rights; and sector-specific guidance.
- Provide a mandate for Ministries, Departments (for example the Petroleum Exploration and Production Department) and local governments to advise businesses on human rights issues. Moreover, the Government of Uganda should ensure that Ugandan Ministries and Departments are well equipped to handle human rights issues. This includes policy coherence across Ugandan Ministries and Departments, in particular, the Petroleum Exploration and Production Department, the Ministry of Energy and Mineral Development, and the Ministry of Lands, Housing and Urban Development. Integral to this issue is the training of all relevant Ministries and Departments in business and human rights issues.
- Organise a review of how Ugandan legislation creates a climate for human rights respect by business enterprises, including labour law, environmental law, corporate law, securities law and other laws regulating the ongoing operation of businesses in Uganda. Likewise the role the Ugandan State can play in requiring companies to implement human rights due diligence. The Uganda Human

Rights Commission, the Directorate of the First Parliamentary Counsel and the Uganda Law Reform Commission are well equipped to guide the legislature in this regard. Enforcement of these laws should likewise be addressed.

- Encourage and eventually require companies to conduct social and human rights impact assessments, alongside the existing requirement for environmental impact assessments. These impact assessments should be quickly and thoroughly processed. Furthermore, the government should encourage, incentivise and eventually require companies to report on human rights impacts. This should be complemented by requirements for local communication of human rights impacts.
- Review the provisions in, interpretation of, and enforcement of existing Acts, including: immediately defining “normal operational safety” under the Petroleum (Exploration, Development and Production) Act within the most limited terms; reviewing the interpretation of Uganda’s National Land Policy and Land Acquisition Act from a human rights lens, and implement resulting findings in order to safeguard the land rights of the Ugandan people; and advancing Uganda’s Access to Information Act by removing barriers to information, including costs.
- Take steps to ensure transparency, including making Production Sharing Agreements with extractive companies open to the public and immediately putting into action measures to sign up to the Extractive Industry Transparency Initiative.
- Provide increased funding to the Uganda Human Rights Commission to enable the Commission’s specialist focus on business and human rights.
- Review issues to enable human rights respect operationally, including working with the Ugandan Securities Exchange (USE) to review the opportunity for USE to regard a duty to society by businesses, specifically human rights, as a listing requirement, and considering the role the Ugandan State can play in requiring companies to implement human rights due diligence.
- Ensure that State-owned enterprises take the lead on human rights, particularly Uganda’s national oil company, NatOil. In order to enable this, the Government of Uganda should enact corporate governance within which transparency and stakeholder involvement should be specifically emphasised. The guidelines/framework should be mandatory.
- Review the process of contracted services and State transactions, particularly with regard to materials used in the oil industry, and contractors managing the relocation of Ugandan citizens living around oil sites and Uganda’s oil refinery. Regarding the latter, the human rights of affected communities should be of the utmost priority.
- Ensure that Uganda’s growing oil sector does not contribute to conflict. In particular: businesses should be encouraged to adopt the Voluntary Principles on Security and Human Rights; the advice of local security non-profit organisations should be heeded regarding internal and cross-border conflict; should any company’s actions contribute to conflict and / or gross-human rights abuses, Uganda should take a firm stance on withdrawing support and approval.
- Review the process by which the State enters into contracts with companies, and bilateral investment treaties with other countries, to ensure that the human rights of Ugandan citizens are paramount, and are not compromised by economic incentives. With regard to the former, the Human Rights Council’s Principles on Responsible Contracts provide useful guidance.

The Republic of Uganda, with regard to remedying human rights abuses by business enterprises, is advised to:

- Perform a judicial review regarding the feasibility of bringing civil and criminal cases against companies in Uganda for human rights abuses. The review should, in particular, focus on better facilitating access to judicial remedy for victims, including reducing barriers to accessing remedy, for example costs and lack of knowledge, and include methods to fight corruption.
- Consider the usefulness of a specific tribunal or court for human rights abuses encountered as a result of the oil industry. This should include fully operationalising the Industrial Court.
- Strengthen state non-judicial grievance mechanisms, such as the Uganda Human Rights Commission.

- Strengthen support to the African Court on Human and People's Rights in order to maximise the Court's capacity to hear cases relating to business abuses of human rights.
- Consider either signing up to the OECD's *Declaration on International Investment and Multinational Enterprises* or else independently implement the OECD's *Guidelines for Multinational Enterprises*. Specifically, this process should include setting up a National Contact Point or a State-formed entity with similar capacities.

The States of the United Kingdom, France and China are advised to:

- Openly communicate their expectation that all national enterprises operating extraterritorially should actively ensure the utmost respect for human rights.
- [Regarding China specifically] adopt similar guidelines to the OECD's *Guidelines for Multinational Enterprises*, including setting up a National Contact Point or a State-formed entity with similar capacities. Likewise, issue guidance on business and human rights to the oil and gas industry.
- [Regarding China specifically] adopt a National Action Plan on business and human rights.
- [Regarding China and France specifically] sign the *Voluntary Principles on Security and Human Rights* and put in place measures to promote the Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones. These measures should be complemented by programmes and tools to advise domestic companies on operating in conflict-prone/affected areas.
- Sign up to the Extractive Industry Transparency Initiative.
- Review their national ability, via legal, regulatory and judicial institutions, to exercise authority over domestic companies operating abroad, especially in the extractive industry. Specifically, regulatory measures should be taken to maximise the national ability to ensure that business enterprises operating abroad not nullify or impair the enjoyment of human rights. These measures could include:
 - Passing domestic legislation to require domestic oil, gas and other natural resource companies to publish the payments they make for access to natural resources in all countries where they operate, i.e. requiring such companies to publish all payments over €100,000 to every country where they operate and for each extractive project.
 - [Specifically regarding China] require all domestic companies with over 500 employees to disclose in their annual reports and relevant material information on social and employee-related matters, human rights, anti-corruption and bribery, and diversity on boards of directors.
- Perform judicial reviews regarding the feasibility of bringing civil and criminal cases against domestic companies for human rights abuses committed abroad. Issues of access to justice, enforceability, and using human rights due diligence evidence as a defence in court should be explored in depth.

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International Peace Information Service (IPIS) is an independent research institute with its office in Antwerp, Belgium. Our research provides governmental and non-governmental actors with information and analysis to build sustainable peace and development in Sub-Saharan Africa. The research is centred around four programmes: Natural Resources, Business & Human Rights, Arms Trade & Security, and Conflict Mapping. IPIS is particularly specialised in field research, investigative reporting and policy oriented analysis. In addition, it enhances the capacity of local stakeholders through training and cooperation.

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ActionAid Uganda (AAU) has been working in Uganda since 1982 with the socially and economically disadvantaged. We focus on people in poverty, those who face discrimination, and whose voices are ignored. We support them to fight for their rights so that they can have a say in the decisions that shape their lives.

ActionAid has a distinctive Human Rights Based Approach (HRBA) to development that focuses on active agency i.e. supporting people living in poverty to become conscious of their rights, organise and claim their rights and hold duty bearers to account.

Our work centres on the protection of women's rights, improving and sustaining livelihoods through ensuring food security, advocating for good governance as a prerequisite to justice, improving access to education for all Ugandans and helping people affected by emergencies and conflict.

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