

Economic & Social Rights Advocacy (ESRA) Brief

July 2017 - Issue 8

**The State
Obligation to
Respect, Protect
and Fulfill
Economic, Social
and Cultural Rights
in the Context of
Business Activities**



INITIATIVE FOR SOCIAL AND ECONOMIC RIGHTS

Acknowledgements

The Economic and Social Rights Advocacy (ESRA) Brief is a bi-annual publication of the Initiative for Social and Economic Rights (ISER) whose goal is to create awareness, encourage and stimulate national debate around social economic rights as well as act as a knowledge exchange platform for stakeholders and the broader Ugandan populace.

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Contents

1. Introduction	Pg. I
2. ‘Minding their Business: the case for a National Action Plan on Business and Human Rights’	Pg. 3 - 7
3. Why Social Safeguards Matter for Investment and Infrastructure Projects	Pg. 8 - 10
4. The Need to Balance Doing Business and Respecting Human Rights State’s Duty to Protect Human Rights - The Ignored Opportunity in East Africa	Pg. 11 - 14
	Pg. 15 - 16
5. Applying UN Guiding Principles in Land Access and Acquistion	Pg. 17 - 19
6. Community empowerment as a tool to enhance corporate accountability: Reflecting on the Kaweeri and Usukuru experiences	Pg 20 - 21
7. Labour Rights Abuse in the Industrial Sector in Uganda: An Overview of Factors Impeding Access to Effective Remedies	Pg. 22 - 23
8. Does the Health Insurance Scheme provide a window for private health care providers to be accountable to the users?	Pg. 24 - 25
9. Balancing between Investor Rights, and Economic and Social Rights in Investment Policy Regimes amidst ‘Corporate Capture’	Pg. 26 - 27
10. Local Content Law is Key for Oil and Gas Industry in Uganda to Create Employment Opportunities for Citizens	Pg. 28 - 29
11. Profit at the expense of human dignity and rights; the precarious position of women in the workplace	Pg. 30 - 32
12. Failure to regulate private actors in education is a threat to the right to education in Uganda	Pg. 33 - 35
13. Community Voices	Pg. 36 - 38

Introduction

Uganda has embarked on an ambitious programme to become an upper middle-income country by 2020.¹ In line with this agenda, the National Development Plan (NDP II) prioritizes private sector led economic growth — particularly in the agricultural, tourism and, most notably, extractive sectors, (since the discovery of oil in western Uganda is expected to have a huge impact on the economy).

The NDP II envisages a significant role for the private sector in financing the country's development and puts forward a series of strategies to create a more conducive environment in which to do business. However, increasing private sector involvement in the country's development has not been accompanied by concomitant efforts to effectively respect, protect, and fulfil human right responsibilities as required by national and international human rights standards.

In terms of Article 20(2) of the 1995 Uganda Constitution, 'the rights and freedoms of...individual[s] and groups...shall be respected, upheld and promoted by all organs and agencies of Government and by all persons'. While this provision recognizes juristic persons as bearers of human rights responsibilities, the laws regulating the human rights impact of corporate activities have weaknesses in their design, implementation and enforcement. Consequently, the careful balancing act of upholding human rights on the one hand while promoting private investment on the other is out of kilter.

In an effort to harmonize and address the gaps and challenges in existing human rights frameworks and policies for corporate stakeholders and other relevant actors, Uganda – following the 2016 Universal Periodic Review (UPR) process – committed to develop a National Action Plan on Business and Human Rights.

On the international stage, the UN Human Rights Council, in 2011, endorsed the UN Guiding Principles on Business and Human Rights (UNGPs).² The UNGPs contain recommendations for governments and businesses, which reinforce the STATE's duty to protect against human rights abuses by third parties, the CORPORATE responsibility to respect human rights and for VICTIMS of human rights abuses to be provided greater access to effective remedy. On 23rd June 2017, the UN Committee on Economic Social and Cultural Rights adopted General Comment No.24 on State Obligations under the International Covenant on Economic Social and Cultural Rights in the Context of Business Activities.³ There is also ongoing debate on a Binding Treaty Initiative, which seeks to develop a legally binding international human rights instrument on Transnational Corporations and Other Business Enterprises.

In this edition of the ESRA brief, we focus on the state obligation to protect, respect and fulfil Economic, Social and Cultural Rights in the context of business activities.

Paula Biraro of the Uganda Human Rights Commission (UHRC) makes the case for a National Action Plan on Business and Human Rights as a mechanism to address corporate abuses of human rights; Commissioner Bernard Mujuni from the Ministry of Gender, Labour and Social Development articulates why social safeguards matter for investment and infrastructure projects; while Arnold Kwesiga of the Uganda Consortium on Corporate Accountability (UCCA) discusses the need to balance the imperatives of business and human rights.

From neighboring Kenya, Joe Kibugu demystifies the state duty to protect human rights while Rose Kimotho discusses the application of UN guiding principles to land acquisition.

1 Second National Development Plan (NDPII) 2015/16 – 2019/20

2 http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (accessed 7 June 2017)

3 E/C.12/GC/24

Citing examples of two communities that have experienced eviction as a result of large-scale investment and exploitation of natural resources, Kange Veronica a Human Rights Advocate, sees hope in community empowerment as a tool to enhance corporate accountability. ISER also presents a compilation of community voices in the form of people's direct accounts of how corporate activities have affected them personally and their communities.

We also feature contributions from the Federation of Uganda Women Lawyers (FIDA) on the precarious position of women in the workplace; Southern and Eastern Africa Trade Information and Negotiations Institute (SEATINI) on the tricky balancing act involved in upholding investor rights on the one hand and economic and social rights on the other; Centre for Health, Human Rights and Development (CEHURD) posits that stronger regulation of private healthcare providers is needed; Global Rights Alert (GRA) discusses the need for community development legislation as a key component in oil and gas governance structures; and human rights advocate, Edrine Wanyama, examines the challenges victims of labour rights experience in enforcing and seeking redress for the violation of their rights.

'Minding their Business: the case for a National Action Plan on Business and Human Rights'



Paula Biraro, Uganda Human Rights Commission (UHRC)

A number of significant ideological and political shifts have occurred, from the time when business corporations maintained that their exclusive preoccupation was to 'mind their business and maximise profits', a goal frequently at odds with human rights. During this era, human rights were deemed to be the sole preserve and responsibility of Government. However, on account of the significant changes brought by globalisation on the scope and breadth of business activities, the influence businesses exert on the socio-political and economic order of states is unprecedented. While it is acknowledged that businesses, large-scale or small, contribute significantly to a country's economic growth and development, there is evidence (from both within and outside Uganda) that commercial entities' are increasingly directly or complicitly involved in the commission of human rights abuses.

Responding to this worrying trend, in 2011 the UN Human Rights Council endorsed the UN Guiding Principles on Business and Human Rights, which posit a Protect, Respect and Remedy Framework by means of which businesses can avert, mitigate or take remedial action for their operation's adverse impacts on human rights and for governments to ensure that business is conducted responsibly.

The desirability of developing a national human rights action plan (NAP) was recommended in 1993 by the World Conference on Human Rights, which adopted the Vienna Declaration and Programme of Action.¹ Several years later, the UN Working Group on Business and Human Rights, as well as proponents of the responsible business agenda, advocated for the development of country specific, tailor-made National Action Plans (NAP) on Business and Human Rights.

In the field of business and human rights, a NAP is defined as an "evolving policy strategy developed by a State to protect against adverse human rights impacts by business enterprises in conformity with the UN Guiding Principles on Business and Human Rights (UNGPs)."² In October 2011, the European Union (EU) was the first region worldwide to call on its governments to develop specific National Action Plans (NAPs) to implement the UN Guiding Principles on Business and Human Rights (UNGPs). To date, 14 States have produced a NAP on Business and Human Rights, of which 12 are from Europe.³ The tables and map below

¹ Art. 71. The World Conference on Human Rights recommends that each State consider the desirability of drawing up a national action plan identifying steps whereby that State would improve the promotion and protection of human rights..

² 'Guidance on National Action Plans on Business and Human Rights' by the UN Working Group on Business and Human Rights Version 1.0 | December 2014.

³ Available at <http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx> Last accessed 25 May 2017.

provide a status on the development of these NAPs by states as at April 2017.

States that have a NAP on Business & Human Rights:

The Netherlands - launched December 2013
Denmark - launched April 2014
Spain - launched in the summer of 2014 (*subject to approval by the Spanish Council of Ministers)
Finland - launched October 2014
Lithuania - launched February 2015
Sweden - launched August 2015 Norway - launched
UK - launched September 2013
October 2015 Colombia - launched December 2015
Switzerland - December 2016
Italy - launched December 2016 USA - launched December 2016 Germany - launched December 2016
France – launched April 2017

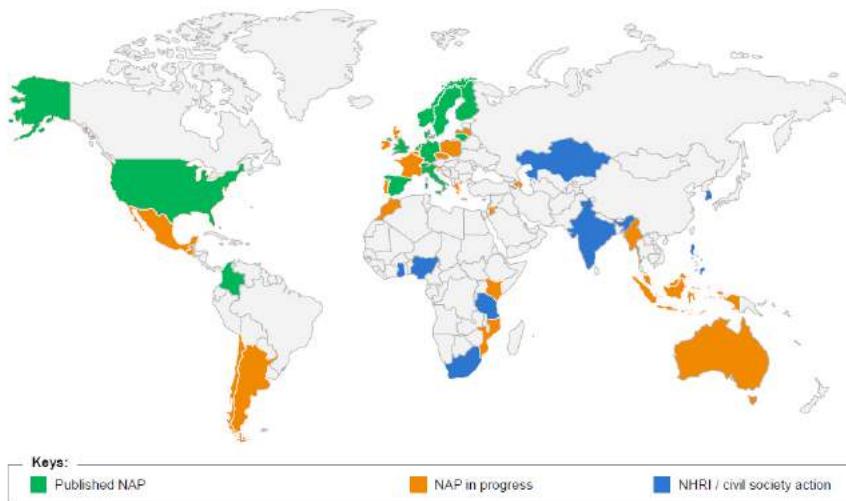
States that are in the process of developing a NAP on B&HR or have committed to doing one

Argentina	Kenya	Latvia	Malaysia
Mauritius	Mexico	Azerbaijan	Belgium
Chile	Czech Republic	France	Guatemala
Greece	Ireland	Indonesia	Jordan
Morocco	Mozambique	Myanmar	Poland
Portugal	Scotland	Slovenia	Thailand

States in which either the National Human Rights Institution or Civil Society have begun steps in the development of a NAP on B&HR

Ghana	Indonesia	Kazakhstan	Nigeria
South Korea	South Africa	Tanzania	Kenya
India	Philippines		

Status on Progress of NAP on B&HR as at December 2016



As noted in the table above, no African State has developed a NAP as yet; however, a few have expressed a commitment to do so, and some like Kenya are undertaking the development of a NAP in partnership with a national human rights institution and/or civil Society.

Uganda has developed a draft NAP document on human rights which is yet to be approved by cabinet (in fulfilment of its voluntary pledge at the country's first Universal Periodic Review (UPR) in 2011). The matter of Uganda developing a NAP on business and human rights was recommended by the UN Human Rights Council at the country's second review in November 2016, which recommendation was adopted by the Government in March 2017.

These NAPs are designed to guide the identification and prioritisation of relevant rights and affected sectors; and, moreover, to provide guidance in relation to how best to address key human rights/issues adversely affected by business activities, for instance sustainable land use, access, ownership, and compensation for appropriation; free prior and informed consent; environmental sustainability and human rights impacts of environmental rights violations; labour rights issues (minimum wage, working conditions, occupational health and safety, discrimination); rights of vulnerable groups, public procurement of goods, services and works; extra territorial obligations by foreign companies and home states; human rights based approach to foreign direct investments and bilateral investment treaties, among others.

Benefits of NAP on Business and Human Rights:

- a) Provides overall strategy and concrete commitments by governments to address business-related human rights impacts in line with UNGPs;
- b) Prioritises addressing actual and potential BHR challenges;
- c) Provides greater clarity by highlighting, in appropriate language, the relevance of human rights for business, demonstrating the business case for human rights and emphasizing practical solutions;
- d) Measuring and tracking progress and reporting on business and human rights compliance and non-compliance facilitating the move by states from commitment to actual reporting;
- e) Reinforcing the implementation, by state and business actors, of business and human rights norms / guidelines;
- f) Ensuring mandatory due diligence by business;
- g) Helping with the implementation and goal/target compliance under the Sustainable Development Goals (SDG) agenda.

Content and Structure of the NAP

The UN Working Group on Business and Human Rights recommended the following as important elements in the content and structure of NAPs:

- a) Statement of Government's commitment to protect against corporate abuses on the one hand and expectations of business on the other, in line with UNGPs;
- b) Business and human rights contextual background in relation to UNGPs and other national policy, such as in Uganda Vision 2040, National Development Plan (NDP), etc;
- c) Identification of key BHR priorities and adverse impacts to be addressed, in light of current and planned UNGP activities, action points, modalities of implementation, responsible actors, time frame and indicators;

- d) Modalities of monitoring and adjusting actions on the basis of progress.



ISER ED Salima Namusobya chats with UHRC Chairperson

Issues raised/Obstacles to developing NAP on B&HR:

I. African States are constrained in their development of business and human rights specific NAPs by technical capacity and resource deficiencies. The formulation of a NAP further requires a holistic baseline survey to be conducted, preferably in a consultative and participatory manner, which has additional financial implications. To address this, proposals (including by Uganda) have been put forward and in some cases measures taken to move away from developing a country specific NAP on B&HR instead:

- a) Integrating NAP on BHR into the NDP or other policy documents (to prevent overlapping & reduce multiplicity of documents);
- b) Integrating prioritised business and human rights issues into the general NAP on human rights; or
- c) Developing sector-specific guidelines for businesses on how best to conduct activities in a manner respectful of and compliant with human rights.

II. Long duration taken to develop NAP: Uganda's current human rights NAP has taken three years to develop.

III. Government buy-in/ownership to develop NAP on business and human rights as a matter of priority after formulating a general NAP.

Conclusion

Making a clear and progressive business case for a NAP on business and human rights is critical not only in terms of motivating Government to take proactive steps to give effect to its responsibility to protect and ensure businesses respect and provide remedy in cases of breach; but it also serves to provide a framework against which to monitor and measure progress in this respect. While a shift in the paradigm towards the development of specific NAPs on business and human rights is welcome, it is vital that obstacles to its development are discussed and concretely addressed to catalyse political will and ensure state ownership of the process.

Information on National Action Plans on Business and Human Rights

UN Office of High Commissioner for Human Rights website:

<http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx>

Business and Human Rights Resource Centre's website: <http://business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-governments/by-type-of-initiative/national-action-plans>



A child in Moroto District searches for gold. The need to boost household income has escalated cases of child labour

Why Social Safeguards Matter for Investment and Infrastructure Projects



Benard Mujuni: Commissioner Department of Equity and Rights, Ministry of Gender, Labour and Social Development

Enhancing the effective participation of communities in development processes and promoting rights, gender equality and women's empowerment in development processes are two of the key strategic objectives of the Ministry of Gender, Labour and Social Development. The Ministry is also charged with the responsibility of guiding interventions related to the protection of vulnerable and marginalized individuals and groups.

Development can bring many positive changes to communities, for example improved public infrastructure and services; however, it also has the potential to create major negative impacts. In Uganda, for example, projects within the extractives industry / oil and gas sector, road construction, construction of hydroelectric dams [Bujagali], the standard gauge railway among others have led to the displacement and fracture of established communities, since projects of this nature require large tracts of land to be cleared before they can be implemented.

The extent and the implications of such displacement are diverse and variable, depending on the nature of the project and density of the population affected. In most cases, displacements are forced, in some cases illegal, which means that recourse to courts is bypassed. Forced evictions and involuntary resettlement processes tend to be associated not only with increased socio-cultural and psychological stresses, but also with higher rates of morbidity and mortality.

Another consequence of population displacement is that it interferes with existing economic and socio-cultural structures, with the result that most affected communities are rendered impoverished, and their prospects of sustainable development are seriously impeded. People who are displaced undergo tremendously difficult life-cycles: the relocation and adjustment process disrupts their access to productive resources including land, social capital, savings groups, access to social networks and so on. Attention to equitable and just resettlement is particularly imperative where the people who are adversely affected are poor, social or economically vulnerable, do not have the resilience to absorb such adverse impacts, and do not have the capacity to remain productive in the absence of significant assistance. Equally important is ensuring that the displacement and reallocation of people from their ancestral grounds does not have a negative impact, particularly on older persons, Persons with Disability (PWDs), the sick and those whose support is derived from the ethno-social set up of the communities.

Compensation should not be the only priority for displaced communities since it is inadequate to ensure comprehensive social protection: it is not just homes that are compromised by displacement, livelihood patterns also break down during this process. In some cases, compensation payments are released after a protracted period. In the case of the Entebbe Express Highway case and the Vegetable Oil development projects in Buvuma Islands, affected communities received compensation after waiting for up to five years!

This delay obviously decreases the real value of the compensation awards in light of inflationary pressure. People should be paid the market value of their properties and they should receive this compensation as reasonably promptly as possible – preferably before the move so that displaced households can use the money to overcome or minimize the hurdles of relocation. The meaning of properties should be expansively understood to mean not only physical shelter but also the value of social networks and capital among other things. Moreover, compensation for land acquisition should not be limited to monetary payments to individuals, but should include appropriate mechanisms for social services or the “Commons” utilized by the community.

The resettlement of people to a different cultural set up has human rights implications in terms of their sense of identity and their social and cultural capital. This is why it is vital to involve the Ministry in all resettlement plans and projects from inception, to implementation and final evaluation. The Ministry provides the necessary support to ensure that physical infrastructure development does not unreasonably impair social infrastructure and livelihoods. It is evident that the structure, design, implementation and operation of infrastructure projects in Uganda have to be improved to reduce their adverse social risks. This is not to undermine the legitimate challenges and uncertainties confronted by investors and developers in relation to the mandatory environmental, social and related safeguards and processes they are required to meet in order for financing agreements to become operable.

Marginalized and vulnerable groups such as women, PWDs, the elderly, persons living with HIV/AIDS are affected differently by displacements; yet very rarely are their idiosyncratic needs and concerns fairly factored into resettlement valuations and processes. In many cultures including Uganda’s, women are involved in land-based activities such as farming and herding animals; as such, they form part of the productive work force and contribute substantially to the sustenance of the family. However, compensation monies typically go to men, in most cases for physical assets as opposed to process-related activities. This frequently results in family fall-outs, that escalate in some instances into physical fights characterized by violence of a gendered nature, with the woman and her children typically the ones deprived access to the resources.

Resettlement action plans must, therefore, be oriented towards communities- rather than individuals. This requires carefully considering, through robust social profiling, existing land tenure systems, inheritance patterns, and local customary practices that govern the entitlement to and use of communal lands. Analyzing the different risks and vulnerabilities experienced by people at different stages of the infrastructure and development process will assist to anticipate and mitigate against the negative social and economic effects of infrastructure, investment and development projects.

However, there are inadequate regulatory mechanisms to ensure equitable involvement of affected communities and individuals in development projects and processes. For example, notwithstanding the enactment of the National Environment Act Cap 153, the analysis of the social consequences of major projects has remained fragmented and lacking in focus. Government agencies such as the National Environment Management Authority (NEMA) have been largely focused on environmental impact assessments without necessarily assessing the broader social impact and livelihood issues within the Oil and Gas sector and under the planned land acquisition process in the Standard Gauge Railway. The environmental impact assessments under NEMA, rarely engage a comprehensive focus on social impact of the projects.

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Efforts by the Ministry of Gender, Labour and Social Development to counter adverse effects of investments and infrastructure projects

Currently the Ministry of Gender, Labour and Social Development is undertaking the process of developing the Social Impact Assessment and Accountability Bill to fill the regulatory gaps. The same process will see the development of regulations, guidelines and policy on Social Impact Assessment and Accountability. The

ministry has established a technical committee to coordinate consultations with local governments, civil society, the World Bank and other development partners. Consultations have, thus far, been convened at inter and multi-sectoral level.

The proposed law brings new areas of innovation, including but not limited to;

- a) The guarantee of participation through the right of inclusion of communities in infrastructure development;
- b) The guarantee of duties and responsibilities of individuals and communities in the development processes;
- c) The establishment of a clearly coordinated secretariat under the Ministry of Gender Labour and Social Development to build synergy with Community Development Officers in Local Governments which host businesses
- d) The guarantee of joint Social Impact Assessment to be undertaken concurrently by the Ministry alongside NEMA EIAs so that bureaucracy does not delay implementation of investment or development projects.
- e) The establishment of Social and Corporate Accountability and Responsibility mechanisms to guide private enterprises in conducting business from a human rights perspective.

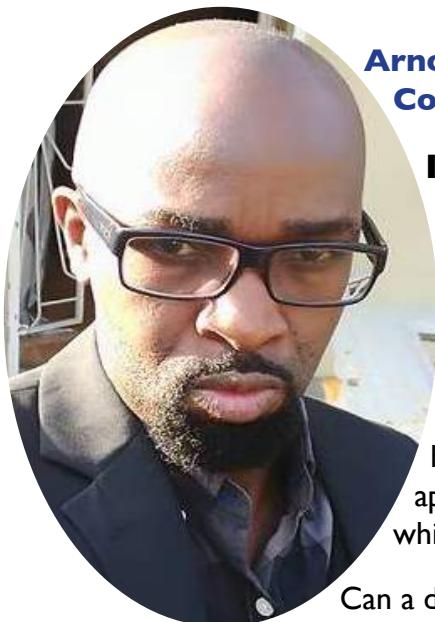
It should be noted that the resolution of economic or social effects is not suited to environmental impact assessments: instead, they call for the formulation of a social impact plan, which plan should outline how to effectively address these effects. This is because social impact assessments go beyond what is considered in environmental impact assessments and encompasses all issues that affect people directly or indirectly as a result of a development intervention.

Social impact assessments further serve to reinforce a rights-based approach to social protection, drawing on international and national commitments to the rights of different social constituencies (children, women, workers, the elderly, and people with disabilities, ethnic, geographical, racial and other cultural minorities). As a proactive stance to development and better development outcomes, it builds on local knowledge by utilizing participatory processes to analyze social economic benefits of interested and affected parties, monitor planned interventions to maximize positive outcomes, and ensure inclusive growth and development.

In addition to the impending law, the Ministry has recently concluded the development of the Social Development Sector Plan II, which introduces new modes of service delivery premised on value for money, social impact mitigation, transparency and accountability.

These policy and legal developments are geared towards addressing gaps in existing environmental impact assessment and development frameworks for different sectors, in order to enhance social protection measures in all development and investment projects.

The Need to Balance Doing Business and Respecting Human Rights



Arnold Kwesiga, Coordinator – Uganda Consortium on Corporate Accountability (UCCA)

Introduction

Over the years, we have consistently heard different political agents castigate human rights activists for highlighting critical human rights violations by corporate entities or within investment or development projects. Strong proponents of human rights in business and development have been labeled 'development saboteurs'. It has become a debatable approach, questioning whether there is a way of achieving development while promoting human rights.

Can a developing country like Uganda afford to respect human rights standards while pursuing a development-driven economic path? How should the country exploit all available resources, while negotiating the rights of a predominantly poor populace that lacks the means to oppose or ensure responsible development within affected communities? All these questions have been interrogated at a political level; however, the weight of political opinion invariably falls on the side of investment and development, even if human and indigenous rights to land and self-determination are jeopardized in the process. A reflection on the status quo, today more than ever, compels us to ask: for whose benefit is business undertaken and development projects implemented? Ensuring that business entities operate with the ultimate goal of improving people's lives and that development and investment projects benefit society ought to be the fundamental premise of every such enterprise. This goal reinforces the need to balance business activities on the one hand with respect and protection of fundamental human rights on the other.

While Uganda's Second National Development Plan (NDP II)¹ is structured in a manner that prioritizes infrastructure development, increased foreign direct investment and the creation of an environment conducive to doing business in Uganda, it omits the key component of due diligence to be applied by and with respect to identifying and attracting investors to the country.

Community based organizations and various NGOs working in natural resource governance and human rights more broadly — especially those with a presence in the resource-rich areas of Karamoja and the Albertine Graben — have repeatedly reported human rights abuses by business actors in these regions. Deepening inequalities, environmental degradation, economic exploitation, land grabbing, pollution and illegal evictions among others have become all too common in these areas. The outcry by vulnerable and marginalized communities in resource rich areas highlights the gaps in safeguards for business interference with human rights, not only in terms of policy and legal frameworks, but also in terms of enforcement of those protections that do exist. The state has failed to ensure that increasing private sector involvement in the country's development is accompanied by adequate regulatory efforts to streamline the corporate responsibility to respect and remedy human rights abuses.

The Corporate Responsibility to Respect Human Rights

In a 2016 incident at Royal Van Zanten, a Dutch flower-exporting farm located in Uganda, female workers developed health complications, which were attributed to poor working conditions. Hon. Amelia Kyambadde, Minister for Trade, Industry and Cooperatives, vehemently attacked the civil society organizations that highlighted the contravention of human rights at the flower farm. The minister characterized the exposure of abuses as serving merely to undermine the rights of investors, traders and their staff. In a Business and Human Rights Resource Centre report on the issue, “Uganda: Workers at Royal Van Zanten’s Farm Develop Health Complications after Allegedly Inhaling Toxic Fumigant,²” the Minister noted that her ministry would work tirelessly “to ensure that Uganda does not lose the market for...flowers abroad.”³ This undertaking raises very critical concerns about the capacity and willingness of the state and its agencies to regulate corporate entities responsible for human rights infringements.



UCCA's Project Officer Mr. Lutalo Derrick inspects a gold tunnel in Rupa Sub County Moroto District.

Article 20 (2) of the 1995 Uganda Constitution asserts that “the rights and freedoms of the individual and groups enshrined in this [Constitution]...shall be respected, upheld and promoted by all organs and agencies of Government and by all persons’ Notwithstanding this, however, it is evident that the state has focused disproportionately on creating fertile conditions and opportunities to conduct business in Uganda without similarly investing in mechanisms to entrench, monitor and enforce respect for human rights, especially those of the individuals and communities most vulnerable to harms perpetrated in the course of business and development activities.

² <https://business-humanrights.org/en/uganda-workers-in-royal-van-zantens-farm-develop-health-complications-after-allegedly-inhaling-toxic-fumigant-includes-companys-comments> accessed 8 June 2017.

³ ibid.

The state's failure to adequately provide key public goods and services such as education and health has, additionally, attracted big business: corporates have rushed in to profit from the offer of private goods and services, or they have offered these in fulfillment of their corporate social responsibility. However, corporate social undertakings should never be accepted as a substitute for or as expunging corporate human rights responsibilities.

A Weak Legal Framework both in Design and Implementation

Uganda doesn't have a clear policy and legal framework on business and human rights. The human rights responsibilities of business entities is dealt with in an ad hoc manner in different pieces of legislation, regulating different sectors of the economy; as well as in different international legal instruments ratified by the country. As noted above, however, Article 20 of the Constitution proffers a formulation on which to anchor corporate responsibility, since this article not only enjoins the state to protect human rights but also tasks it with ensuring that non-state actors respect human rights.

The key human rights abuses committed by business actors in Uganda relate to land. Land is a commodity on

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which the majority of Ugandans subsist and survive. However, there are no clear policies and laws that enforce free prior and informed consent principles in terms of the acquisition of land and properties for investment or development purposes. The result of this has been unreasonable, inadequate and delayed disbursements of compensation for land deprivation, contrary to Article 26 of the Constitution⁴.

According to the Global Land Tool Network, Uganda's current land policy and legal framework faces severe challenges, including outdated legislative provisions, poor implementation of land policies, inadequate security of land tenure and ownership, insecure land-related investments; inadequate dispute resolution mechanisms and increasing land evictions on registered land and customary land, among others.

Environmental compliance is no better: the National Environment Management Authority struggles to effectively fulfil its mandate of monitoring and ensuring corporations' compliance with environmental standards. The authority has been blamed for corporate encroachment into protected areas and failing to curb pollution by business. Additionally, the methodology and process of Environmental Impact Assessments (EIAs) has been criticized for failing to secure the social protection of the vulnerable people, groups and communities it is ostensibly designed to. There is broad consensus that a comprehensive social protection policy is necessary to ensure that social issues and the protection of the people is prioritized in all investment projects; and, further, that where the severe effects of investment or development projects cannot be mitigated, then alternative means of development that don't threaten human existence should be explored instead.

Uganda's labor laws protect less than 20% of the total workforce, namely those employed in the formal sector. However, most Ugandans work in the informal sector and thus fall largely outside the ambit of legislative protection. Basic rights and protections against child labor, forced labor, right to paid leave, maternity leave, economic exploitation and rights to work in safe and health working conditions among others therefore

4 26. Protection from deprivation of property.

(1) Every person has a right to own property either individually or in association with others.

(2) No person shall be compulsorily deprived of property or any interest in or right over property of any description except where the following conditions are satisfied—

(a) the taking of possession or acquisition is necessary for public use or in the interest of defence, public safety, public order, public morality or public health; and

(b) the compulsory taking of possession or acquisition of property is made under a law which makes provision for—

(i) prompt payment of fair and adequate compensation, prior to the taking of possession or acquisition of the property; and
(ii) a right of access to a court of law by any person who has an interest or right over the property.

remain predominantly unenforced. According to the 2016 report of the Uganda Consortium on Corporate Accountability entitled “The State of Corporate Accountability in Uganda,” most working conditions in the informal sector, in particular within the informal mining sector, are hazardous and grueling —in some instances verging on modern day slavery.



UCCA Coordinator engaging with CSOs in the Albertine region on issues of corporate accountability.

Conclusion

The state must ensure that social protection is a key component of any sustainable economic development drive. Any gaps in the legal frameworks, which heighten socio-economic vulnerabilities and impede corporate accountability, must be addressed. Laws and policies must, moreover, be developed in an inclusive manner and address existing social gaps that stifle equity and fair justice in economic development measures. Without these measures, the current impact of economic development mechanism will only serve to entrench the poverty and vulnerability of marginalized groups, deepening inequalities and exacerbating social distress.

It is, therefore, critical that instead of labeling civil society organizations (CSOs) and human rights advocates as ‘economic saboteurs’ and ‘anti-development’, the state should devise measures to collaborate with all CSOs as partners and important stakeholders in the governance structures of the country. CSOs play a critical role in supporting the state to pinpoint and fill in gaps and reach areas and communities government programs may not. All State and non-state actors must have a common purpose, that is, for all investment and development strategies and projects to benefit all Ugandans.

State's Duty to Protect Human Rights - The Ignored Opportunity in East Africa



Joseph Kibugu, East African Researcher and Representative – Business and Human Rights Resource Centre

In international human rights law, as in many domestic legal systems, States as duty bearers – have an obligation to respect, protect and fulfil human rights for those people under their jurisdictions. States' duty to respect requires them to refrain from conduct that impedes the enjoyment of the right in question. For instance, government agencies should ensure that they do not arbitrarily demolish dwelling houses. The duty to protect implies taking measures to ensure that third parties do not violate the rights of right holders. An example is where an environmental regulatory agency declines to issue permits and approvals for businesses that are likely to pollute the environment. Finally, the duty to fulfil means intervening in cases where there is fundamental violation of rights and securing the enjoyment of the rights. For example, by feeding famine stricken families during draught.

One of the opportunities for States to honor their obligation to protect human rights is through their dealings in and with businesses. States engage in business in one of two ways: (i) either through parastatals such as a state-owned power utility company or agricultural firm; or (ii) through procurement for routine supplies or contracting for big projects such as infrastructure developments. These are two potent avenues for States to leverage and buttress their human rights obligations to ensure that third parties do not violate human rights.

The United Nations Guiding Principles on Business and Human Rights (UNGPs) have a three pillar framework that spells out the duties and responsibilities of governments and businesses respectively in relation to the impacts of business on human rights. The first pillar is on States' duty to protect human rights: Principle 4 reiterates that the imperative for States is to “*take additional steps to protect human rights abuses by business enterprises that are owned or controlled by the State...including where appropriate by requiring human rights due diligence*”!

Such business enterprises are usually more regulated by States than is the case with ordinary businesses. In many cases, state enterprises are created under statute or in some instances subsidiary legislation, which defines their operations. Additionally, their State-centric nature means that they are funded by taxpayers. This means they are closely regulated by the duty bearers and funded by the right holders. Is it not therefore imperative that utmost care is taken to ensure that they equally do not infringe human rights?

States are the biggest procurer of goods and services from business enterprises. Principle 6 of the UNGPs deal with States' obligation to promote respect for human rights by businesses with which they conduct

commercial transactions, primarily through procurement. The attendant commentary recognizes procurement as presenting States with “*unique opportunities to promote awareness of and respect for human rights by those enterprises, including through the terms of contracts, with due regard to States’ relevant obligations under national and international law.*”²²

There has been growing and encouraging movement towards increased transparency in government procurement, with the exception of the security sector due to often-cited ‘national security’ considerations. For instance, in Kenya, the establishment of the Public Procurement Oversight Authority anchored in an Act of Parliament and whose mission is to “*facilitate access to procurement opportunities through enabling regulation that fosters value for money for national socio-economic development*”, has served to introduce greater oversight and transparency in respect of government procurement processes. Additionally, courts have severally intervened in the awarding of tenders on account of the State’s failure to observe fairness and comply with established rules.

States often receive funding from multilateral donors such as the World Bank, African Development Bank and the European Investment Bank. These financial institutions have human rights safeguards to ensure that projects they fund do not harm local communities. There have been several cases of suspension or cancellation of funding due to human rights considerations. The World Bank suspended funding for a road construction project in Uganda after allegations of sexual harassment of female employees by the contractor were raised. It took the intervention of the Uganda National Roads Authority to resolve the matter. Similarly, the United Nations Development Program (UNDP) suspended its association with an agribusiness BIDCO Oil Company after concerns were raised that the project was impoverishing locals by depriving them of their livelihood. This suspension arose following a complaint by the Bugala Farmers Association. The report compiled by the U.N.’s Social and Environmental Compliance Unit following an investigation into the complaint, noted that among other key violations BIDCO had engaged in human rights, labour and environmental violations. If institutions which do not have legally binding human rights obligations to local communities are demanding responsible business practices that respect human rights of the projects they fund, shouldn’t States be even more vigilant? Surely this constitutes an ignored opportunity.

Moreover, this ignored opportunity smacks of contempt, because States continue to award contracts to business enterprises that infringe on the protections conferred by their country’s Bill of Rights. For example, why should a government engage a contractor who is notorious for compelling his employees to work overtime without pay, or exposes them to hazardous chemicals without the appropriate protective gear? Or a contractor whose employees are known to sexually exploit minors in areas where they have ongoing projects? Why should the taxpayer, who finances public procurement, have to defend him/herself from businesses that are oblivious at best or careless at worst about how they impact his/her rights. Against this backdrop, human rights due diligence in States’ business dealings is not merely a good thing to do. It ought to be obligatory.

Applying UN Guiding Principles in Land Access and Acquisition



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The adoption of the UN Guiding Principles on Business and Human Rights (UNGPs) in 2011 was a watershed moment, serving to clarify states' obligations and businesses' responsibilities in relation to human rights. The framework comprises three mutually reinforcing principles¹: the state duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for greater access to effective remedy for those adversely affected by business conduct.

Applying the UNGPs within the context of land access and acquisition is not straight forward as there is no explicit right to land in international human rights law. However, it is well accepted that numerous other rights are impacted by access to land. Accordingly, and in recognition of these different rights and interests of individuals and communities to land, states have the obligation to protect from arbitrary deprivation by having in place policies, laws

and regulations that provide reasoned, fair, just processes that ensure that the process of land access and acquisition by third parties does not harm the rights of people. In considering what right has been harmed, it is important to appreciate the spectrum of rights that derive or are dependent on providing access to land: right to housing, clean and healthy environment, food, water, access to basic services such as health and education, culture and identity, the right to earn a living etc.² In many places, land ownership serves as a prerequisite for access to and the exercise of certain civil and political rights³.

For indigenous communities, land rights are of fundamental importance as their attachment and dependency on land is a prerequisite for their very survival in terms of economic livelihood, spiritual, cultural and social identity. Consequently, numerous international guidelines now provide that when making decisions with regard to development projects, which result in loss of land, states should promote the community's right to participate in the decision-making process through consultations based on adequate information; a few countries have codified similar standards in their national laws.⁴ Where land acquisition results in relocation and resettlement, affected persons should be compensated in a fair, just and timely manner. Resettlement is not merely compensating and moving people but the process of working with affected persons, restoring livelihoods and providing support to vulnerable persons.⁵ The process must not leave people worse off than before and most importantly should not render people landless.⁶

1 Ruggie speech available at <https://www.ihrb.org/other/supply-chains/making-economic-globalization-work-for-all>.

2 https://www.ihrb.org/pdf/Land_Rights_Issues_in_International_HRL.pdf.

3 Land rights in International Human Rights Law, Institute for Human Rights and Business, https://www.ihrb.org/pdf/Land_Rights_Issues_in_International_HRL.pdf.

4 By way of example Peru and the Philippines include requirements of FPIC in their national laws.

5 Gerry Reddy, Eddie Smyth and Michael Steyn, Land Access and Resettlement: A guide to best practice (Greenleaf Publishing: 2015).

6 https://www.ihrb.org/pdf/Land_Rights_Issues_in_International_HRL.pdf.

For businesses, mere compliance with national laws is inadequate. The UNGPs call for respect of, at minimum⁷, internationally recognized human rights –those under the International Bill of Human Rights⁸ and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.⁹



An opinion leader from Buliisa District speaks out on land matters and issues of compensation in the oil rich District.

Deference to international human rights laws and standards is significant as most countries have limited laws addressing land access matters; with those in place often comprehensive only in respect of acquisition, suffering from a paucity of information on compensation, and often silent on important related issues such as resettlement standards, community engagement, and re-establishment of livelihoods.¹⁰ In addition, there is generally a widespread lack of guidelines on how to undertake these processes. To fill these gaps different institutions have developed standards and guidance documents on or related to land access and related issues which include among others, International Finance Corporation, Performance Standards on Environment and Social Sustainability;¹¹ World Bank, Involuntary Resettlement Source Book: Planning and Implementation in Development Projects¹²; African Development Bank, Integrated Safeguards System¹³; European Bank for

7 Depending on their circumstances businesses may have to look beyond the above instruments, see, http://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf.

8 This refers to the Universal Declaration on Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and its two Optional Protocols.

9 Principle 12, UN Guiding Principles on Business and Human Rights.

10 Reddy, Smyth and Steyn, Land Access and Resettlement, op.cit., note 5.

11 https://www.ifc.org/wps/wcm/connect/c8f524004a73daeca09afdf998895a12/IFC_Performance_Standards.pdf?MOD=AJPERES accessed 6 June 2017.

12 <http://documents.worldbank.org/curated/en/206671468782373680/pdf/301180v110PAPE1ettlement0sourcebook.pdf> accessed 6 June 2017.

13 <https://www.afdb.org/en/documents/document/afdfs-integrated-safeguards-system-policy-statement-and-operational-safeguards-34993/> accessed 7 June 2017.

Reconstruction and Development, Resettlement Guidance and Good Practice¹⁴, Inter-American Development Bank, Involuntary Resettlement: Operational Policy and Background Paper¹⁵ among others. While the applicability of these standards is limited in scope, some – in particular the IFC standards – have come to be regarded as the guiding standards in the natural resource sector, hence companies are often required to take them into account.¹⁶

However, a mere commitment to follow standards and guidelines is insufficient: companies are, additionally, required to conduct human rights diligence¹⁷ in order to identify, prevent, mitigate and account for how it addresses adverse human rights impacts arising out of its operations.¹⁸

Where land acquisition results in relocation and resettlement, affected persons should be compensated in a fair, just and timely manner.

With regard to land rights, the due diligence process should seek to establish and understand the legitimate and varied tenure systems and it should also seek to establish ways to engage affected communities.¹⁹ It is also expected that where

businesses have caused or contributed to rights violations, they should provide or cooperate in a legitimate remediation process.

The third pillar, the remedy pillar, requires that victims of corporate human rights abuse should have access to remedy. The UNGPs recognize a variety of remedies under the categorization of state-based and non-state-based remedies. States have the obligation to ensure access to remedy through the court, or administrative or other appropriate mechanisms. The challenge is that in many jurisdictions the functioning of these are less than efficient and the lack of viable alternatives to act as an effective deterrent is likely to result in further violations. This necessitates having non-state based remedy frameworks. These include those established by businesses separately or jointly with other stakeholders, for example an industry association or multi-stakeholder group. Complaints mechanisms of regional and international human rights bodies also fall into this category. The UNGPs also include an effectiveness criteria for non-judicial mechanisms as a standard to guide the design, and to improve upon and assess the efficacy of such systems.²⁰

Grievances related to land access and acquisition are a frequent feature in many extractives projects – to such an extent that experts consider land access the greatest risk to such projects.²¹ This reality calls for efficient, judicious, robust, just (and perhaps dedicated) grievance mechanisms to effectively respond to the risk.

14 <http://www.ebrd.com/news/2017/ebrd-launches-new-resettlement-guidance-and-good-practice-publication.html> accessed 7 June 2017.

15 Available at, <http://www.iadb.org/en/about-us/involuntary-resettlement,6660.html> accessed 7 June 2017.

16 Reddy, Smyth and Steyn, Land Access and Resettlement, op.cit.,note 5..

17 For an explanation of what human rights due diligence implies and entails see, http://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf.

18 http://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf.

19 The Interlaken Group and the Rights and Resources Initiative (RRI). Respecting Land and Forest Rights, A Guide for Companies, Washington, D.C. (The Interlaken Group and RRI: 2015).

20 Principle 31, UN Guiding Principles on Business and Human Rights.

21 Reddy, Smyth and Steyn, Land Access and Resettlement, op.cit.,note 5..

Community empowerment as a tool to enhance corporate accountability: Reflecting on the Kaweerri and Usukuru experiences



By Veronica Kange: Advocate, Public Interest Law Clinic of the School of Law Makerere University

“Together we stand, divided we fall” is a very common slogan whose weight can easily be underestimated! However, working with affected communities one is more readily able to appreciate the effectiveness of this slogan in practice. It is always evident that one of the greatest weapons that any community facing any kind of challenge has is speaking one language in one united voice.

As a human rights lawyer, I have had the privilege of working with two different communities faced with similar challenges related to corporate abuses of economic social and cultural rights. One community is located in Mubende district, Central Uganda and the other in Usukuru, Tororo district in Eastern Uganda. Nature placed these communities on golden grounds, with phosphates in the Tororo lands and fertile soils, perfect for coffee growth in Mubende. The communities have, however, since learnt that the existence of such potential on their land is not always a good thing. Both communities have faced violent evictions perpetrated by both state agents and big foreign companies with the financial capacity to exploit the golden grounds.

In Mubende, over 400 people were evicted from their ancestral lands over 19 years ago: the land was given to a German company for coffee growing. Listening to stories of how the evictions were executed is not a pleasant experience. Stories of excavated graveyards, setting alight of dead bodies, the destruction of crops and houses, assault of community members and manhandling of the resolutely obstinate were common occurrences in this community.

Tororo's story is no different: following a process characterized by egregious contractual breaches, the locals were forced to sign over land they once called home. Duress, violence and other forms of compulsion were used to ensure that the company secured the desired land for the purpose of phosphate mining.

Over 19 years after the Mubende Kaweerri experience, the people of Tororo are, unfortunately, telling a similar story. History repeating itself, with the perpetrators of these heinous crimes yet again walking away with impunity leaving victims aggrieved at the lack of any form of accountability.

Following massive sensitization and mobilization of the victims in Mubende district, a case was instituted in the High Court seeking legal remedies for the human rights abuses suffered by the community at the hands of the German Company and the government. It has been 19 years of continuous struggle but the continuous empowerment drives have helped the victims sustain faith.

They have since learnt that they have rights and that no matter how long it takes, the short hand of justice does eventually stretch to the helpless. 19 years later, the people have not lost hope, they have since become seasoned fighters who insist on fair and adequate compensation for the pain and suffering that characterized their eviction. Sitting in a room with the Mubende victims is a pleasing experience, as they speak from a well-informed point of view; the fear that once sealed their mouths and barred them from expressing their opinions has dissipated. The determination and zeal exhibited by this community is in part attributable to the empowerment initiatives of civil society. An un- or under-empowered community is a danger to itself, as such a community is easy prey for investors since they would not be informed of their rights and so would likely put up little or no resistance to an onslaught by a sophisticated corporation.

The grounds of Kaweeri that once held beautiful mud houses, makeshift shops and simple drinking joints where people spent their evenings catching up with the trending village stories have since turned into square miles of coffee plantations; yet the people who were displaced still seek resettlement.

In contrast, the community in Tororo district reflects their empowerment deficit: the people are yet to speak a common language, many have been intimidated by their experiences...Many have lost hope, they seem to have accepted their fate and have not coalesced as a collective to challenge the status quo.

However, this does not mean that the journey is over: Mubende was in a similar state several years ago. Through the combined efforts of a few committed spirits, implementation of empowerment initiatives and consistent provision of legal aid service, a significant turn-around was experienced, giving rise to the Kaweeri spirit in the Tororo community. What this powerfully demonstrates is that community empowerment is not a race but rather a journey. Moreover, even though the empowerment journey is often met with resistance – from some community members, local leaders and allies – over time, people come to appreciate the agency and power that knowledge and empowerment provide; they also realise the contribution it takes to nurture community spirit and fuel the demand for fair treatment. Empowerment produces communities that are not afraid to demand accountability from government and businesses and communities that have reserves of patience that sustain their demands over weeks, months and even years: it certainly does not matter how long it takes, the focus remains securing the desired results.

Duress, violence and other forms of compulsion were used to ensure that the company secured the desired land for the purpose of phosphate mining.

Labour Rights Abuse in the Industrial Sector in Uganda: An Overview of Factors Impeding Access to Effective Remedies



Edrine Wanyama, Human Rights Advocate

Introduction

The government of Uganda has, as part of major efforts to improve the livelihood of Ugandans, taken deliberate efforts to create favourable conditions (including legal and policy) to attract investment into the country. In addition, vast tracts of land – in different parts of the country including among others Mbale, Kampala, Wakiso, Mukono, Mbarara and Jinja – have been gazetted and degazetted for industrial exploitation. However, not all such commercial exploitation has been conducted in a responsible manner resulting in the destruction of wetlands, forests and other natural habitats and resources.

What this highlights is that while socio-economic development is contingent on economic activity, this must be performed in a manner respectful of domestic, regional and international human rights instruments.

Uganda has ratified and domesticated all of the International Labour Organisation's (ILO) Fundamental Conventions regulating the rights of persons in and conditions of the workplace, including *inter alia* the Forced Labour Convention, 1930 (No. 29), Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), Right to Organise and Collective Bargaining Convention, 1949 (No. 98), Equal Remuneration Convention, 1951 (No. 100), Abolition of Forced Labour Convention, 1957 (No. 195), etc. These conventions have been domesticated in Acts such as Workers Compensation Act 2000, the Employment Act 2006, the Labor Union Arbitration and Settlement Act 2006 and the Occupational Safety Act 2006 among others. Notwithstanding these laws, however, there continues to be rampant abuse of the rights of Ugandan employees on the one hand and a fear by such victims to report violations and to seek redress on the other.

Employees further need to be assured of protection so that cases of intimidation do not adversely affect their efforts to enforce their rights.

Abuse of Employees' Rights

Article 40¹ of the Constitution of the Republic of Uganda

1 40. Economic rights.

(1) Parliament shall enact laws—

- (a) to provide for the right of persons to work under satisfactory, safe and healthy conditions;
- (b) to ensure equal payment for equal work without discrimination; and
- (c) to ensure that every worker is accorded rest and reasonable working hours and periods of holidays with pay, as well as remuneration for public holidays.

(2) Every person in Uganda has the right to practise his or her profession and to carry on any lawful occupation, trade or business.

(3) Every worker has a right—

- (a) to form or join a trade union of his or her choice for the promotion and protection of his or her economic and social interests;
- (b) to collective bargaining and representation; and
- (c) to withdraw his or her labour according to law.

(4) The employer of every woman worker shall accord her protection during pregnancy and after birth, in accordance with the law.

guarantees economic rights for all Ugandans; however, these rights are frequently violated, with workers subjected to inter alia hazardous working conditions; exploitative treatment such as withheld, delayed or under remuneration, arbitrary discrepancies in pay for the same tasks performed, denial of resting hours during working hours, denial of public holidays and legislated leave; abuse of maternity rights; overworking employees; denial of the right to join trade Unions; sexual harassment; unfair dismissal and unlawful termination of employment. Some employees have even fallen victim to human trafficking, typically following promises of lucrative employment both within and outside the country.

Unfortunately, in many instances the labour rights abuses listed above are frequently conducted with impunity, with various and multifaceted obstacles to justice.

Obstacles to Employees' Justice

The difficulty encountered by Ugandan victims in asserting their labour rights and seeking justice for their infringement is attributed to several factors, some of which include:

- Fear of loss of employment: Consequently, there is a sentiment that an employee ought to be grateful for tenure and remuneration, which results in diminished bargaining power on the part of the employee. Fear to report labour rights abuses creates a culture of impunity and a continuous cycle of abuse by employers.
- Complex and unfriendly justice system: In practice, employers have an upper hand when it comes to the pursuit of justice, since they have greater resources to secure legal representation even for a protracted case. Victims, on the contrary, often have to rely on public defenders and in many cases victims are not sophisticated and thus struggle to follow the complex legal process, and often the repetitive court appearances required of the victims interfere with their work responsibilities, for which reason they may be motivated to abandon proceedings before they are concluded.
- Ignorance of the law and rights: many workers are ill-informed about their labour rights; those who are aware of their rights may not necessarily know where to seek recourse in the event of their rights being violated. They may also struggle to comprehend how labour law is administered in Uganda or understand how to navigate the justice system. Additionally, courts of law are dispersed all over the country with no clear publicity on their location and processes of operation. The only industrial court in Uganda is located in Kampala yet labour rights abuse occur countrywide. Accessibility to the industrial court is thus severely hampered for people who live far from Kampala. This creates room for further abuse of rights of employees with impunity.

Conclusion and Recommendations

The full realisation and enjoyment of labour rights leads to the enjoyment of other rights such as the right to health, the right to an adequate standard of living and other socio-economic rights. Conversely, the abuse of such rights, with impunity, similarly impedes enjoyment of related rights such as those listed above.

There is, moreover, a need for more proactive dissemination to the general public of information pertaining to their rights broadly and labour rights in particular, including avenues through which labour rights may be enforced. There is also an urgent need to harmonise the industrial sector policy and legal framework, especially provisions pertaining to the enforcement of employees' labour rights. Employees further need to be assured of protection so that cases of intimidation do not adversely affect their efforts to enforce their rights. Finally, the government needs to ensure that businesses fully respect, observe and implement the Occupational Safety and Health Act 2006 in order to ensure that the good health of employees is assured while they are at work.

Does the Health Insurance Scheme provide a window for private health care providers to be accountable to the users?



James Zeere: Legal Officer, Centre for Health, Human Rights and Development

Ugandans are increasingly turning to private health facilities due to the enormous challenges experienced by public health facilities. Factors such as long queues at public health facilities, and regular stock outs of essential medicines and supplies have made the experience of using public health facilities less desirable for health clients. A patient who can afford it would rather pay to access adequate and timely health care at their convenience and to forgo the cost saving of public health facilities which are supposed to provide adequate and quality health care at no cost.

Private health care providers have become key players in the health sector. The 2015/2016 Annual Health Sector Performance Report discloses that the number of people who visited private health facilities for their first treatment increased from 27.1% of all people visiting all health facilities in 2008 to 36% in 2015. In upcountry locations like Karamoja with few private health facilities,

the number of people visiting private health facilities was established at 15% while in Kampala up to 59% of the people accessing health care did so at private health institutions. There is no doubt that the private healthcare sector is playing a major role in fulfilling Ugandans' right to access health care, which is an admirable thing.

With all the shortcomings and challenges confronting public health facilities, they are often at the frontline of health service provision unlike private actors who venture into the sector with a profit-driven motive. With this state of affairs, a concern arises about the principles of medical ethics and human rights, which are intended to protect the public against abuse and mistreatment at the hands of healthcare personnel. Whereas Uganda's Ministry of Health has put in place standards to recognize medical ethics and ensure the protection of human rights through such measures as the Clients Charter and the Patients Charter and also established structures, for example the Health Unit Management Committees and Hospital Boards, to enforce and provide a level of accountability in respect of these standards; private healthcare facilities – although bound by the same standards – have not established formal structures to enforce compliance.

The discretionary adherence to standards, in other words the absence of direct accountability for failure to respect human rights within the private healthcare sector, raises serious concerns about long-term respect of patients' rights. Moreover, due to low levels of awareness among patients of their rights, some violations go unreported, contributing to a culture of impunity. A practical example is the case of International Hospital Kampala, which in October 2016 was sued by the Center for Health Human Rights and Development¹ (CEHURD) for infringing a patient's right to personal liberty by detaining him against his will for failing to pay his medical bill in full. The hospital finally relented to the patient leaving after the case was filed. The matter

¹ See CEHURD Press release at <https://cehurd.org/2016/09/press-statement-release-obiga-patrick-from-ihk-jail-today-freeobiga/> (accessed 20th June 2017).

was ultimately quietly settled out of court. At the same time, a hospital in Kololo was taken to the Uganda Medical and Dental Practitioners Council (UMDPC)² for subjecting its health workers to poor working conditions, which resulted in several personnel contracting viral infections from patients. In another instance, CEHURD³ sued a private hospital in Kampala for employing unqualified medical personnel, some of whom were implicated in the death of a baby that was prescribed the wrong medication.

Health care provision is a highly sensitive area of practice and the government of Uganda has a Constitutional Obligation to protect the rights of the public from negative encroachment by private healthcare providers. Private health care is presently regulated by the UMDPC⁴ which is responsible for accrediting and registering private healthcare facilities, conducting inspections of these facilities to ensure that they meet medical standards, and investigating complaints against private institutions or personnel and issuing sanctions where appropriate. However, the shortcoming of the UMDPC is that it has primarily been established to regulate the medical and dental practitioners in private health care and does not look beyond the health worker to the corporate owner of the health unit. From experience, where human rights abuses or a transgression of medical ethics is alleged at a private health facility, the medical officer in charge of the facility is held liable for the violation and the corporate owner of the facility is not pursued.

Due to low levels of awareness among patients of their rights, some violations go unreported, contributing to a culture of impunity.

Despite this shortcoming in the regulatory framework for private health facilities, the impending introduction of the National Health Insurance Scheme Bill is set to significantly benefit owners of private healthcare facilities. The anticipated increase in demand for healthcare as a result of increased numbers of insured individuals is likely to increase the

fortunes of corporate healthcare entities accredited to provide healthcare under this scheme. Clause 45 of the Health Insurance Scheme Bill limits application of the Act to accredited health care providers while Clause 47 sets out the requirements a health care provider must fulfil to be eligible for registration under the Act. One of the requirements is that the health care provider should recognize the rights of patients, health workers and their safety. However, the pedestrian manner in which it is provided for gives leeway to abuse of a provision, which could play a significant role in addressing violation of human rights by corporate health care providers. The concern is that the Clause is created without defining what amounts to recognition of human rights by private facilities. It is important to define and specify standards upon which it can be established that a private health unit is recognizing human rights.

This provision would be greatly strengthened by the inclusion of a standard against which to measure recognition of human rights: it is not sufficient for a private health facility to merely recognize patients' rights; they should additionally be required to demonstrate that they have upheld respect for and protection of human rights in the course of providing healthcare. The benefits of this are twofold: firstly, the incentive of benefiting from the scheme will encourage private healthcare service providers to improve their standards to actively comply with their human rights obligations. Secondly, it will improve the quality of healthcare provided by private healthcare service providers, therein contributing to the attainment of the National Health Insurance Scheme's objective of achieving equity in access to healthcare.

2 See CEHURD Press Release at <https://cehurd.org/2016/07/protect-health-workers-rights-while-on-duty-imc-clinics-in-the-spotlight/> (accessed 20th June 2017).

3 <http://www.monitor.co.ug/News/National/Couple-sues-Mengo-hospital-over-baby-death/688334-2777590-u0r9dpz/index.html> (accessed 20th June 2017).

4 See objectives of UDMPC at www.umdpc.com (accessed 20th June 2017).

Balancing between Investor Rights, and Economic and Social Rights in Investment Policy Regimes amidst ‘Corporate Capture’



Faith Lumonya- Southern and Eastern Africa Trade Information and Negotiations Institute (SEATINI)

Investment, whether domestic or foreign, is critical for development. This is because of its contribution to industrial sector development which is critical for fostering forward and backward linkages and therefore employment creation, technology transfer, skills development, value addition, revenue generation and sustainable development. It is no wonder that today, there is hardly any government, especially in the developing world, that is not working to increase its investments, especially Foreign Direct Investments (FDIs).

According to the World Investment Report 2016, within the East African Community (EAC), FDIs have been registered to be growing at an unprecedented rate with approximately 7 billion USD flowing into the bloc as at 2015. Intra-regional investment has also continued to grow with Kenya at the forefront. While this growth in investment inflows is related to the liberalized investment policy regime, the development promises of these investments are yet to be realized; while at the same time, the rights of communities continue to be violated and environment sustainability to be undermined.

But what or where exactly is the missing link? This article highlights the inconsistencies within the investment policy regime that have created imbalances between the protection of investor rights on the one hand and human rights on the other, which imbalance demonstrates the failure by government to respect, protect and fulfil people's fundamental rights.

In the first instance, investment policy regimes place people's economic and social rights at the periphery, giving prominence to the protection of investors' interests. Consequently, profits are given greater priority than are people's rights. For example, contemporary investment policy regimes such as Investment Codes and Bilateral Investment Treaties (BITs) employ a definition of expropriation whose implications most developing countries are unfamiliar with. Indirect expropriation has been defined as state measures which have the effect of substantially depriving an investor of the value of their investment through regulatory interference such as the revocation of a license; it has also been defined as the erosion of an investor's rights over time through a series of actions¹. In light of this, environmental, labour or health laws enacted subsequent to the establishment of an investment agreement can be argued to constitute an expropriation of that investment. While the state's obligations provided under the UN Charter and Covenant on Economic Social and Cultural Rights include the protection, respect and fulfillment of the human rights of the people within its jurisdiction, the existence of business/ investment policy regimes that

The absence of requirements for Social and Human Rights Impact Assessments and due diligence exercise reports of businesses and investments prior to their establishment is a major missing link.

¹ Yacine Francis, Senior Associate, Allen & Overy, Dubai, http://investmentpolicyhub.unctad.org/Upload/Documents/Yacine_Expropriation_Presentation.pdf (accessed 20th June 2017).

do not provide for the protection of fundamental rights including among others labour, health, environment, food rights and the like, undermine governments' capacity to give practical expression to these obligations.

If, for example, the government of Uganda – in an attempt to ensure better protection of its citizens' labour rights – and decided to amend the country's current Employment Act to require all existing firms to provide standardized protective gear for employees for the protection of their health, such companies could deem this to be an indirect expropriation. Similarly, if the government amended the National Environment Act to provide stronger protection against pollution and disposal of waste material; and to protect the health of affected communities, companies adversely affected by such an amendment could challenge it on the basis that it constitutes government's indirect expropriation of their companies. Companies often argue under such circumstances that in order for the company to undertake the necessary adjustments to operate within the requirements of the new law, additional costs must be incurred which would have an effect on their profits hence the charge that it amounts to an indirect expropriation.

In South Africa, Italian investor Marlin Holdings, Marlin Corp and RED Graniti South Africa objected to the application of Black Economic Empowerment (BEE) rules – implemented by the government as part of its post-apartheid transformation agenda – to foreign companies². The aim of this BEE policy was to economically empower previously disadvantaged black people by requiring their participation in all aspects of an investment or commercial enterprise. The policy was highly contested, especially by foreign investors already established in the country, who would be required to incorporate into their ownership and supply-chain structures novice players purely on the basis of their race. However, by this time, the South African government had already lost its policy space to defend the development interests of its locals to the Italian government through a BIT, the two countries had signed. This was made even worse by the fact that some aspects of the BITs were incompatible with the country's constitution and other laws. Consequently, this BIT was reviewed to allow for legal challenges to regulatory changes in the public interest.

Typically investment policy regimes tend to be characterized by contestations of different actors imbued with different degrees of power, which invariably influences the dynamic between the respective investment and state partners. The policy making process and its implementation has for a long time now remained under the influence of the private sector and at the global level, the developed countries and their Multinational Corporations whose main agenda is profit maximization. This has further been reinforced by the limited commitment of many developing country's governments to effectively implement and mainstream in their national laws and policies, even internationally set human rights and environment standards. Consequently, the subsequent investment policies, laws and agreements have narrowed the policy space of governments like Uganda's to be able to regulate business activities in line with the country's development goals.

Finally, the absence of requirements for the undertaking of Social and Human Rights Impact Assessments and due diligence by businesses and investments prior to their establishment is a major missing link. The absence of this analysis undermines the ability of both state and non-state actors to hold businesses accountable. It also undermines corporate accountability which is fundamental to ensure that businesses at the very least operate in accordance with minimum standards and that communities are able to hold errant corporates accountable.

In conclusion, balancing private investors' rights and protections against the fundamental rights of citizens is not an easy task; the success of this balancing act further depends on the investment policy regime in place, in light of the extensive 'corporate capture' evident in states with weak or compromised regulatory environments. An appropriate investment regime is critical to buttress the policy space of government and ensure that it is able to fulfil its obligations to respect, protect and fulfil human rights. A review of Uganda's current investment policy regime is, therefore, necessary to assess whether the inclusion of safeguards is necessary in order to include safeguards is necessary to ensure that the interests of Ugandans are fully protected.

² SEATINI Uganda, Both ENDS, An analysis of the Uganda-Netherlands Agreement on Encouragement and Reciprocal Promotion and Protection of Investments: Policy recommendation for its review.

Local Content Law is Key for Oil and Gas Industry in Uganda to Create Employment Opportunities for Citizens



James Muhindo, Human Rights Advocate / Project Officer- Global Rights Alert

According to Uganda's 2014 population census, 77% of the country's thirty four million people are under the age of 30 years. Worryingly, eight out of every ten youth (aged between 15 and 35) are unemployed, irrespective of their level of education. The Ministry of Gender, Labor and Social Development recently announced that the government had entered into an agreement with the United Arab Emirates (UAE) to facilitate the passage of young people – including university graduates – to the UAE to work as *inter alia* maids and security guards. This agreement demonstrates that there is a dire need for employment opportunities for Ugandan nationals.

The writer contends that if appropriately regulated, the oil and gas industry has the potential to contribute significant employment opportunities.

A policy report of the Baker Institute of Public Policy at Rice

University entitled "The Changing Roles of National Oil Companies in International Energy Markets," asserts that approximately 90% of new hydrocarbon production in the next 20 years will be from developing countries such as Uganda. Many of these nations have introduced 'local content' requirements into the regulatory frameworks governing natural resource developments. The aim of these local content requirements is to create jobs, promote enterprise development and promote the acquisition of new skills and technologies.

Oil companies are enjoined to give preference to goods and services which are available in or can be supplied by Ugandan entrepreneurs, and also to provide training and employment opportunities for Ugandans.

"Local content" provisions explicitly require the comprehensive participation of local populations in the entire venture, i.e. capital investment/ownership, direct employment, supply chain and procurement. Of particular interest, is the added value brought to the host nation (and region and local area in that country) through the activities of the oil and gas industry. This may be measured and undertaken through workforce development e.g. employment and training of local workforce, and investment in supplier development through developing supplies and services locally or procuring these supplies and services from local providers.

Why then does Uganda need a local content legislation? As stated above, most countries incorporate local content requirements into the regulatory frameworks that govern natural resource exploitation. This makes the enforcement of these standards easy from the onset, which is not the case for Uganda since the Upstream and Down Stream legislation did not properly provide for local content requirement.

It is important to note that The Petroleum (Exploration, Development and Production) Act 2013 provides in part VIII for state participation and national content. Pursuant to sections 125 and 126 of this Act respectively, oil companies are enjoined to give preference to goods and services which are available in or can be supplied by Ugandan entrepreneurs, and also to provide training and employment opportunities for Ugandans.

However, experiences from other countries have shown that oil companies, being pure business ventures whose primary object is profit making, always circumvent some of these provisions if they are not entrenched enough¹. There are always excuses of local entrepreneurs failing to meet the requisite international standards disqualifying them from supplying certain services and goods. In extreme cases, like Angola, oil companies have been said to import even basic supplies like Chicken or bottled water, suffocating local enterprises.

In terms of employment, the oil and gas industry takes place in four stages i.e. exploration, construction, production and decommissioning. The absorption capacity, in the form of employment, varies at each stage, with construction being the peak stage. Since 2006, Uganda has continued the exploration for oil wells. However, construction is also currently ongoing with a set target of commencing production between 2018 and 2020. According to the Joint Venture oil Companies (Tullow, CNOOC and Total Plc), at its peak; the sector will employ 13,000 people who will sublime to 3,000 permanent jobs when production starts. This means that we are currently at a stage when the sector is employing or yet to employ at full capacity. According to ExxonMobil, an American Multinational Oil and Gas Corporation, “A stable and predictable business environment supports the delivery of successful local content programs.” However, given the precariousness of business environment especially for oil and gas, statements like this serve as scapegoats for oil companies not complying with the local content requirements.

Rev. Fr. Edward Obi², a Civil Rights Advocate from the oil producing Niger Delta of Nigeria says, “once production starts, the oil and gas industry is capital intensive and highly mechanized hence it employs very few people.” This equally reduces the goods and services demanded by the oil companies hence limiting any employment that may be incidental to the industry.”

If Uganda’s oil and gas industry is to become a considerable employer, both directly and through its supply chain companies, a Local Content law is critical. This law not only regulates the participation of citizens in the sector but also mandates the companies to ensure that whatever supplies or services can be locally sourced are provided by locals. In so doing, the law will ring fence certain jobs or provision of services to Ugandans thereby increasing employment opportunities for Ugandan Youths. Oil-producing countries like Ecuador have made local content a strategic issue by developing elaborate local content strategies. In conclusion, therefore, Uganda ought to put in place a proper local content legal and regulatory framework to ensure the utmost State oversight for increased participation of locals in the oil sector, both upstream and downstream.

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1 Andrew Inkpen *et al*, 2011, The Global Oil and Gas Industry: Management, Strategy & Financing. Pennwell, P. 13.
 2 Vision Reporter, 2014, Nigerian Cleric Warns Uganda Over Oil Curse. Available at https://books.google.co.ug/books?id=aN-LaFh_o3GcC&pg=PA13&lpg=PA13&dq=Oil+Companies+are+profit+Oriented&source=bl&ots=We3Fn2G1sz&sig=eRs2LVMFM0R-5B1ZVSD4DN83hwAY&hl=en&sa=X&redir_esc=y#v=onepage&q=Oil%20Companies%20are%20profit%20Oriented&f=false (accessed 20th June 2017).

Profit at the expense of human dignity and rights; the precarious position of women in the workplace



**Irene Ekonga, Federation of Women Lawyers (FIDA)
Uganda**

leadership positions within the public and private sector, in politics and other professions previously the exclusive preserve of men (for example, construction and engineering fields).

Today, smart economics makes the case for the inclusion of women in productive activities outside the household: there is significant empirical evidence that shows that utilising women's skills and talents in the workplace contributes towards poverty eradication, economic growth and reducing inequalities.¹

However, while significant strides have been made, a great deal still remains to be done to ensure more widespread gender parity. Women continue to face numerous challenges in the workplace – irrespective of the industry, sector or rank at which they are employed. Moreover, whereas some challenges are crosscutting, others are unique: women are plagued by issues such as sexual harassment, gendered pay discrimination, gender-biased rather than meritorious promotion and the like. Women employed in low-skill positions (for example domestic or char work, etc.), particularly in privately owned businesses, are especially vulnerable to abuse and exploitation. Women are significantly under-represented in supervisory and managerial positions,

In patriarchal societies, of which Uganda is one, the normative expectation is that a woman's place is in the home, attending to her husband and children's needs. This is a deeply entrenched belief which concerted legal, policy and socio-cultural efforts have relentlessly failed to combat.

However, feminists, women's rights activists and practitioners have, over the past century, worked tirelessly to debunk this stereotype, in an effort to dismantle the barriers impeding women's entry into the commercial and public sphere. A multi-pronged advocacy approach was used for this purpose, including such strategies as campaigns to promote education for girls, affirmative action measures, mentorship, skills development and steps to facilitate women and girls' transition from the home into the work place. After several years of such interventions, there is a notable increase in the number

**Women are plagued
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¹ Organization for Economic Cooperation and Development (OECD), *Gender Equality in Education, Employment and Entrepreneurship: Final Report to the MCM 2012*. <http://www.oecd.org/employment/50423364.pdf>. p. 17. See also, Klasen, S. and Lamanna, F. (2009), "The impact of gender inequality in education and employment on economic growth: New evidence for a panel of countries," *Feminist Economics*, 15: 3, pp. 91-132 (as retrieved from UN Women, *Progress of the World's Women 2015-2016: Transforming economies, realizing rights* Chapter 4, p. 199).

with the result that they do not have influence and power to make independent decisions, having to defer instead to the decisions of male superiors and ensure effective implementation of their decisions.² Therefore, the hierarchical structures of decision making in patriarchal households is replicated in the work place.

Research and anecdotal evidence also indicates that women in privately owned businesses in Uganda are subject to high rates of sexual harassment and violence.

growth was identified as central to the strategy to address these challenges.³ Hence, the government is endeavouring to create a conducive environment for private investment, both domestic and foreign.⁴ However, this narrow focus has serious implications for human rights: some critics contend that measures to bolster private investment have the potential to facilitate or legitimise business practices that impair the dignity and welfare of workers or contribute to the exploitation of women workers in particular. Moreover, bottlenecks in redress mechanisms have resulted in the creation of a culture of impunity, rendering workers largely defenceless to the unscrupulous practices of rich and powerful business owners, many of whom are linked to politically influential people and capitalise on this patronage to escape the legal and regulatory constraints on their businesses.⁵

The reality for women occupying low ranking positions is deeply troubling; – women working in privately owned farms, factories, plants and companies, including multinationals are even worse off.

It appears that companies deliberately target women's perceived vulnerability. In a study⁶ into the horticulture sector in Uganda, for instance, many employers expressed a preference for female workers, on the ground that they are '*less demanding, more stable and can easily be managed*'.⁷ Companies and businesses that subscribe to this view would be more inclined to employ women in low-skill or low-remuneration jobs such as grading, packing, harvesting, cleaning, collecting rubbish, making tea and sweeping etc.; positions which would invariably impede their prospects of progressing up the ranks, increasing their future earning potential, enhancing their status within the company and accessing decision-making positions. The more positions of this nature are disproportionately staffed by women, the more likely they are to become classified as "women's work" and associated with stereotypically feminine characteristics (e.g. requiring dexterity, a careful touch, etc.) posited as prerequisites for the assumption of the role. The result of this circular conflation of job requirements with gender traits is an entrenchment of traditional gender roles and intractable gender inequality.

2 Katrin Elborgh-Woytek, Monique Newiak, Kalpana Kochhar, Stefania Fabrizio, Kangni Kpodar, Philippe Wingender, Benedict Clements, and Gerd Schwartz ,International Monetary Fund, Strategy, Policy, and Review Department and Fiscal Affairs Department, **Women, Work, and the Economy: Macroeconomic Gains From Gender Equity, September 2013**, For example, during 2008-12, the share of women among CEOs in Standard and Poor's 500 companies remained at 4 percent.¹¹ In the 27 EU countries, only 25 percent of business owners with employees are female. In 2012, only about 20 percent of national parliamentary seats across the world were held by women. And when women do assume higher positions in public office, they are more likely to occupy ministries with a socio-cultural focus than those with economic and key strategic functions (OECD, 2012). Moreover, micro-level evidence suggests that gender stereotypes may hamper women's participation in politics.

3 See further Second National Development Plan (NDPII) 2015/16 – 2019/20.

4 ibid.

5 Isaac Khisa, the Independent, 7th December, 2016 "Ugandan women working at Royal Van Zanten flower farm poisoned by pesticides-Trade minister dismisses workers' claims to protect flower industry". "The Minister for Trade, Industry and Cooperatives, Amelia Kyambadde did not want to hear of the complaints. On Nov.17 she dismissed reports that any workers were poisoned. She stormed Ntinda hospital where a section of the company's workers had been hospitalised and said her Ministry will continue to handle the matter jointly with the Ministry of Labour "to ensure that Uganda does not lose the market for her flowers abroad.".

6 Promoting Women Workers' Rights in African Horticulture, Women Working Worldwide, 2007, Pg 13. Also see Developing Strategies for Change for Women Workers in African Horticulture' The Case Study of Uganda, 2011, Uganda Workers Education Association and Women Working Worldwide.

7 Ibid.

What is the position of women in Uganda? In a context of a stagnant economy, rising inflation, high rates of unemployment, spiralling living costs, growing inequality, excessive pressure on land and other natural resources, and mounting citizen discontent, the government of Uganda is hard pressed to come up with solutions to alleviate the suffering of the masses and stimulate economic growth. Private sector led

Research and anecdotal evidence also indicates that women in privately owned businesses in Uganda are subject to high rates of sexual harassment and violence: about 50% of workers agree that sexual harassment occurs in companies, which harassment is perpetrated primarily by male managers and supervisors against female junior workers.⁸ According to trade union leaders in the horticulture sector for instance, the majority of sexual harassment cases are not reported for fear of victimization.⁹ Failure to properly address these abuses, which disproportionately affect women, sends the message that women's grievances and rights violations are not a corporate concern, thereby sustaining inequality between men and women in the workplace.

It is, most frequently, women who are employed in low-skilled, low-paying and/or ad hoc jobs, which do not enjoy the labour protections and benefits, such as paid maternity leave, paid sick leave, insurance and annual leave among others) formally contracted employees are afforded. Moreover, evidence shows that the majority of women working in private firms do not enjoy maternity protection, despite this being guaranteed under the Employment Act.¹⁰ In the horticultural sector, for example, only about 20% of eligible workers are given 1-2 months maternity leave as opposed to sixty working days as per the Employment Act. It has also been established that only about 30% of pregnant women are assigned lighter work. Childcare facilities are also largely unavailable and breastfeeding breaks for nursing mothers not granted by some companies. Often pregnancy and childbirth also bring with it uncertainty about job security, forcing women to return to work before they have fully healed from childbirth. A dearth of protective gear is another concern frequently cited by workers, which is especially problematic where safety requirements, for example relating to the handling of chemicals, require protective measures to be put in place, in particular for breastfeeding mothers who are both personally at risk and also risk contaminating their children through breastfeeding.¹¹

Opportunities for merit-based promotion also continue to elude women in lower level jobs. Sexual harassment and violence also harms women's advancement opportunities and prospects in the workplace. Job insecurity and high unemployment rates also make workers reluctant to demand their rights or participate in union activities. For the same reason, women in low-level positions may also be less inclined to report infractions of labour law or sexual harassment, further compounding their vulnerability.

While women's entry into the workspace is necessary for their economic emancipation, employment alone is not sufficient: a great deal still needs to be done to make the workplace a safe and conducive space for women. Government and other stakeholders must take steps to strengthen existing legal protections for, among other things, wage levels, working conditions, women and mother-friendly facilities, monitoring and supervision of compliance, and effective enforcement of sanctions. Mandatory gender policies and effective gender mainstreaming will go a long way towards promoting the effective participation of women in the workplace. This in turn will, among other things, increase women's agency, enhance business efficiency¹², improve child welfare¹³ and bolster economic growth.

⁸ Frank Kiwalabye, Effects of Sexual Harassment at the Workplace: a Ugandan Case Study, Youth Crime Watch Uganda, Pg.8
'At least 3 in 5 women have been victims of sexual harassment in the work place.'

⁹ Ibid.

¹⁰ In the New vision of Wednesday June 21, 2017 in an article titled "Women discriminated against at work". It was reported that at the International Women's conference in Turkish capital Ankara, Uganda's representative Sarah Nabulya (treasurer general of the National Organisation of Trade Unions) noted that 'women are concerned that employers show more respect to male workers than women. They are discriminated against in terms of salary payments even when they have more experience or are more educated, when it comes to maternity leave most employers don't grant enough time to the women after they have given birth.'

¹¹ Developing Strategies for Change for Women Workers in African Horticulture' The Case Study of Uganda, 2011, Uganda Workers Education Association and Women Working Worldwide, Pg 26-28.

¹² McKinsey & Company. Women Matter 2014 at p. 6.

¹³ The World Bank, 2012, World Development Report: Gender Equality and Development, at p. 5.

Failure to regulate private actors in education is a threat to the right to education in Uganda



Saphina Nakulima, Program Manager Right to Education - ISER

All persons have a right to education in terms of Article 30 of the 1995 Constitution of the Republic of Uganda. Government has the primary responsibility to provide education for all children.¹ In accordance with international human rights law, the state has the primary responsibility to provide free and compulsory primary education, and to progressively avail free secondary education². Notwithstanding this right to state-administered education, international human rights law also recognizes the freedom to establish private educational institutions³. In Uganda, similarly, Part VII of the Education Act 2008 makes provision for the establishment of private schools.

In recent years, the number of private education providers in Uganda has increased significantly. Currently, 36.2% (6,841) of primary level schools and 62% (1,672) of secondary level schools are private.⁴ As of 2015, the private school enrolment as a percentage of total enrolment stood at 17.2% at primary level and 50.0% at secondary level.⁵

Frustratingly, despite this growth in private education providers, government has not kept pace in terms of effective regulation and monitoring to ensure the adherence of these actors with the Ministry of Education's Basic Requirements and Minimum Standards (BRMS). School regulation and supervision is upheld as a perpetual challenge, attributed to the lack of financial means and human resources.⁶ Many sub-standard private schools have capitalized on the shortcomings of the education regulation and supervision systems, and unscrupulous actors quite blatantly take advantage of the public. Thus, many private schools have opened despite not complying with BRMS. A recent report of the Parliamentary Education Committee, for example, highlights the Ministry of Education and Sports' closure of unlicensed private schools,⁷ some of which were in such a dire situation that they lacked qualified teachers, had poor infrastructure (including classrooms, consisting of make-shift or dilapidated structures and devoid of sanitary facilities); did not have furniture, instructional materials and so forth. This status quo might not be so dire if proper mechanisms to regulate

¹ International Covenant on Economic Social and Cultural Rights (ICESCR), 1966, Article 13; CESCR General comment 13, 1999: para 48.

² Article 13 of the ICESCR.

³ See article 11 (4) of the African Charter on the Rights and Welfare of the Child (ACRWC), and article 13 (3) of the International Covenant on Economic, Social and Cultural Rights (ICESCR)..

⁴ Per Ministry of Education, Science, Technology and Sports Education Statistical Abstract 2015.

⁵ Ibid.

⁶ Initiative for Social and Economic Rights (2016) A threat or Opportunity? Public Private Partnership in Education.

⁷ Report of the sectoral committee on education and sports on the closure of private schools by the ministry of education and sports, April 2017.

and monitor education were in place to ensure educational standards and quality were upheld.



Very unsafe and unhygienic latrine at one of the private schools ISER visited in eastern Uganda

Despite the poor conditions of many private schools, high fees are characteristic. Even private schools that are ostensibly low-fee require supplementary fees allocated to school development, scholastic material, school uniforms and to off-set examination costs, which defeats the purpose of the low tuition.⁸ These additional costs often keep parents from sending their children to school contributing to high drop out rates, particularly in respect of children from poor backgrounds. An even more egregious impediment to access is the fact that children in these private schools who fail to pay their fees are often subjected to humiliation tactics, such as for example, being paraded before their peers or singled out during school assembly, denied entry to (or the results or reports of) examinations and other assessments. In addition to compromised quality (of education and infrastructure among others), premature closure of private schools is another common occurrence – sometimes in the middle of a school term leaving pupils and their parents stranded – typically once proprietors of the school fail to achieve desired profits.

Where government has successfully intervened to close private schools that are not compliant with BRMS, the proprietors of such schools have put up great resistance, including in the form of protracted legal battles. For example in 2016, government ordered the closure of Bridge International Academies (BIAs) on the ground that BIA's schools were sub-standard measured against BRMS. BIA brought a legal challenge⁹ against the government's decision; however, the matter was dismissed with costs.

Following BIA's legal failure, the Ministry of Education in 2017 closed several schools including Bridge International Academies as reported by the Parliamentary Education Committee in April 2017.¹⁰ However, BIA continues to operate in Uganda notwithstanding these developments – a fact which greatly undermines

8 http://iser-uganda.org/images/downloads/privatisation_discrimination_and_right_to_education.pdf.

9 High Court Miscellaneous cause No. 160 of 2016.

10 Parliamentary Education Committee Report of April 2017.

the legitimacy of Uganda's government.

It is not surprising, therefore, that the regulation of private education providers is becoming more challenging and that government faces even more of an uphill task of regulating and implementing standards (including fees schedules) in schools in which it has a stake i.e. government-aided schools. Under section 2 of the Education Act, 2008, a "government-aided school" implies a school, which although not founded by Government is the recipient of a statutory grant or Government aid, and is jointly managed by representatives of the school's foundation body and Government. The majority of secondary level schools fall into this category; very few schools are solely government founded and funded. In light of this, the Initiative for Social and Economic Rights (ISER), on 15th February 2017, petitioned the Speaker of Parliament regarding the high tuition and non-tuition fees charged by government-aided schools - this despite the schools receiving public funds. In response to the petition, the Ministry of Education issued a circular to all secondary level head teachers and Governance Boards, restricting them from among other things increasing school charges without prior authorization from the Permanent Secretary- Ministry of Education. Although this circular was issued in the first term of 2017, some schools went ahead and increased their fees in term two of 2017.

Where government has successfully intervened to close private schools that are not compliant with BRMS, the proprietors of such schools have put up great resistance.

Therefore, inasmuch as the country has a legal and policy framework for education in place, regulation and supervision of its implementation is seriously lacking. Governments' failure to strictly regulate private actors in education compromises its ability to successfully fulfil its obligations under international human rights law pertaining to the realization of the right to education; this shortcoming also has negative implications for the State's ability to protect against private education providers' exploitative practices.

Community voices

One of the often neglected but significantly affected stakeholders – both by investment and development projects – are the communities where such projects are implemented. Communities in natural resource rich areas and large investment projects often bear the brunt of the negative human rights impacts of development projects implemented by corporate actors. The exploitation of natural resources, similarly, is often beset by attendant issues ranging from economic exploitation, environmental degradation, land grabbing, forceful evictions and civil conflicts among others. Management of these processes invariably begs the question: how should a State balance respect for human rights against economic development?

We reached out to some of the people affected by investment and development projects and asked them to share how they or their communities have been affected by such projects.

I. Ssesanga Godfrey aged 64, Njeru West, Njeru Municipality in Buikwe District



Ssesanga lives next to a sugar factory called GM Sugar limited. The factory was established in 2004 but Ssesanga has lived in this area for over 40 years. Ssesanga does not know the owners of the factory, as they have never had a formal meeting with residents. Ssesanga says he and his community have suffered since the factory set up operations. His house and toilet developed cracks due to the vibration of the machines at the factory and lorries carrying sugarcanes. The biggest challenge according to Ssesanga is the small particles emitted by the factory.

Mr. Ssesanga Godfrey shows off the particles from GM Sugar Ltd

“When they fall on your eyes you must go to hospital, you cannot remove them yourself. We stopped harvesting rainwater and growing vegetables because those particles are all over. I used to grow greens and tomatoes but they will be full of particles and you cannot wash and finish them. I do not know their effect to my life. You cannot eat from outside, even inside our bedrooms you find them there. Some anonymous people approached me and offered Thirty Million Shillings (30m)¹ to make me move away but this is too little compared with the time I have been here,[the] disturbances and my house.”

2. Kikomeko Madina, Lugazi LCI in Njeru Municipality in Buikwe District

Ms. Kikomeko is the caretaker of her family's ancestral home and land, which borders GM Sugar Limited factory. She claims that the factory encroached upon and took over part of her land. The factory has made several attempts to close the community feeder road that connects her home to the neighbors.

¹ US\$ 8,400.

“They have made life impossible for me, they want me to leave this place because the factory wants my land but I cannot exhume the remains of my late husband and other family members because I am a Muslim and I have also lived here my entire life. What if I move and experience the same problems? How long will I keep on moving?”

3. Nnalongo Wamala aged 65, Lugazi LCI in Njeru Municipality in Buikwe District

Nnalongo suffers from a physical impairment since the factory started operating in the area. **“The noise from the factory is unbearable. Now I cannot hear properly. The factory also runs a tyre recycling plant and when they are burning tyres, we go away from home for some time.”**

4. Basiga Christmas, Bulumagi Village in Nyenga Sub County in Buikwe District

Basiga Christmas manages a fish project and cultivates crops at Bulumagi village in Nyenga Sub County in Buikwe District. The project is adjacent to the GM Sugar Factory Ltd. According to Basiga, the wastewater from the factory flows direct into the garden and fishponds.

“They made drainage channels but during the rainy season the channels flood. I have lost fish and crops due [to] the toxic chemical[s] that come along with the water from the factory. I have given up on growing yams because for years they have been drying up. This season I was not able to harvest maize from the biggest part of my garden.”



Mr. Basiga wants the factory to work on the waste management and to contain it to stop it from flowing anyhow.

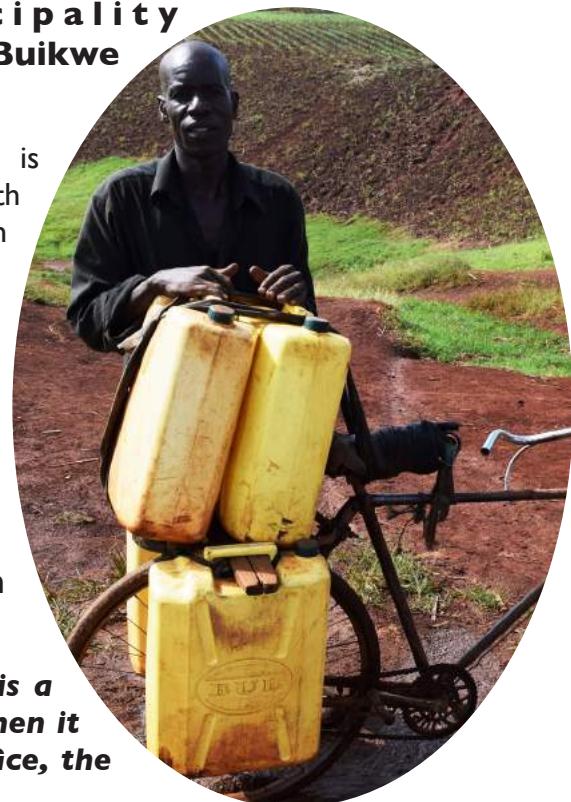
Mr. Basiga at one of the channels GM Sugar Ltd uses to drain its waste water

5. Kidimbo Alex, Kikawula village in Lugazi Municipality in Buikwe District

The town is faced with the problem of nasty smell coming from Sugar Corporation of Uganda Limited (SCOUL).

“Though these days it’s not regular but when it comes you cannot eat anything.”

Mr. Kidimbo Alex



6. Mukasa Kivumbi, Lugazi town centre in Lugazi Municipality in Buikwe District

Mukasa runs a media consultancy in Lugazi Town. **“There is a bad smell around 8:00pm and whenever it rains. When it starts you loose appetite. Even if you close the office, the following day you find it smelling badly.”**

7. Tamale Augustine aged 25, Busiba Village in Nakisunga Sub County Mukono District

Tamale was a casual laborer at Tian Tang Group of companies at their iron bar factory located at Mbalala in Nama Sub County MuKono District. In the year 2011, he was burnt by the melted scraps while on duty.

“I was treated until [I was] discharge[d] but was not compensated. I was called to go and work but cannot manage because I cannot stand for long and the scars are painful. I cannot afford to buy medicine for the scars and sustain my wife as well as our two children. For six years they have been promising to process the compensation in vain.”

8. Aisha Nassanga aged 38, Njeru Municipality in Buikwe District

Nassanga lives close to GM Sugar Ltd. The factory has blocked a community feeder road that leads to their home and community water source.



“The road has been there since time immemorial but they have set up a perimeter wall within the road and erected a chain link on one side to deter community access. We now are using a small path to access our house. We have made several appeals with no remedy. We are always told that issues of that factory are handled by top government officials and that they [the company] are only answerable to them.”

Ms. Nassanga Aisha at her home which is adjacent to the sugar factory. She says the factory is closing community access roads including the one to her home

People affected by oil activities in the Albertine region

I. Obotha Joselin, Nyahaira Village Buseruka Sub County Hoima District

Oboth was affected by oil refinery project. For the last five years she has been waiting for government to resettle her but all in vain.

“Many people were compensated and left the place, [wild] animals...and cattle keepers have invaded the area destroying our gardens. There is nowhere I can get food to feed my family. My six children are no longer going to school and this makes me regret why oil was discovered here.”

2. Okumu Venus aged 42, Nyahaira village Buseruka Sub County Hoima District

Okumu, a father of seven children is another victim of the Oil Refinery Project.

“Our lives were far better than how it is now before the oil in this region became “a song” to everybody in this country. Since our land was taken and we were stopped from cultivating it has made our lives very difficult. We cannot send our children to school because the schools where our children used to go are closed. We cannot access health services because we do not have money, all the water sources in this areas are broken down so we can not access a clean water source”.

About the Initiative for Social and Economic Rights - Uganda

ISER is a registered national Non - Governmental Organisation (NGO) in Uganda founded in February 2012 to ensure full recognition , accountability and realization of social and economic rights primarily in Uganda but also within the East African region.



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