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Victims of Business-Related Human Rights Violations Need Effective Policy Considerations to Access Effective Remedies – A Case of the Oil and Mining Sectors in Uganda

AUTHOR

Malcolm Mpamizo



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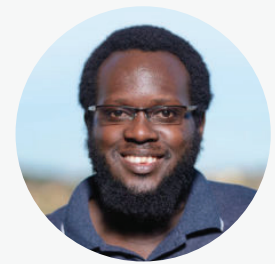
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Victims of Business-Related Human Rights Violations Need Effective Policy Considerations to Access Effective Remedies – A Case of the Oil and Mining Sectors in Uganda

Malcolm Mpamizo



This policy brief argues for policy action to ensure that victims of business-related human rights violations in Uganda have access to effective judicial remedies. The state duty to ensure access to effective judicial remedy is sine qua non for the realisation of the right of access to judicial remedy. Increased investment in Uganda, particularly in the oil and mining sectors, has seen a proliferation of cases of business-related human rights violations while the concept of corporate accountability remains uncharted in the Ugandan context. In the oil-rich Albertine graben region where oil exploration and production have started, in the Karamoja sub-region and Mityana where minerals such as marble and gold are being unearthed and extracted, and in Mukono where businesses are engaged in stone quarrying investments, there is evidence of increased business-related human rights violations. These victims do not always access effective remedy owing to lack of access to information and the laborious and expensive judicial system. This policy brief postulates the need to amend legal provisions to provide for the introduction of Human Rights Impact Assessments (HRIA) as a due diligence prerequisite to establishing businesses; and the need for government to subscribe to the Extractives Industry Transparency Index (EITI).

1. Introduction

Recent years have brought a boom in investment to Eastern Africa fuelled, in large part, by oil and other mineral discoveries, and the demands for biofuels and other agricultural products. There is potential for these investments to help fulfil economic and social rights by contributing much needed revenue to finance improvements in health, education and standards of living.

The United Nations Conference on Trade and Development (UNCTAD) revealed in its 2013 World Trade Investment Report that Uganda received the most foreign direct investment in 2012 in East Africa, which rose from \$894 million in 2011 to \$1.7 billion in 2012.¹ This rise was largely attributed to the oil discovery in Uganda's Western Albertine Rift. The discovery of oil in Uganda has raised much expectation and anticipation that the country will be able to free itself from the poverty stranglehold. However, there is equally apprehension and trepidation that poor governance of oil resources and their revenue will leave the oil boom as a curse rather than a blessing.

Combined with the increase in mining interests for gold and other high-value minerals, Uganda has attracted various multinational corporations (MNCs) to invest in the country. However, this continues to raise eyebrows over the state's ability to hold MNCs accountable. One cause of such trepidation is the increase in the complaints about the violation of human rights and the right of access to effective justice and remedy for the victims of such business-related human rights abuses in this era of hyper-globalised economies and liberalisation of trade and investment. While patterns of corporate human rights malfeasance existed long before the ascendancy of globalisation and may not necessarily be blamed on increased globalisation, it is difficult to overlook the extent and severity of the human rights violations occasioned by unregulated or under-regulated MNCs in the era of liberalised international trade and investment.²

¹ UNCTAD 2013 report.

² Steven Bittle and Laureen Snider, 'Examining the Ruggie Report: Can voluntary guidelines tame global capitalism?' (2013) 21 *Critical Criminology*, 177 – 192 at 179; see also John Douglas Bishop, 'The limits of corporate human rights obligations and the rights of for-profit corporations' (2012) 22 *Business Ethics Quarterly*.

In Uganda, since work on a refinery, exploration and other steps to exploit the country's oil have begun in earnest, there has been a five-fold increase in complaints about the industry's local impacts, including challenges associated with accessing effective remedy for human rights abuses.³ The impact of abuses of human rights in this context has been widespread in terms of its nature and it ranges from violations of the right to life, property, security, housing and clean food and water, to rape, torture, beatings, extrajudicial killings and other egregious abuses.

MNCs have become powerful and influential global actors and many developing countries, such as Uganda, lack the resources or political will to control them and their activities. This makes reliance on the state obligation to protect human rights a major challenge, with some countries actually granting

corporations de facto control over certain territories and limited interference from the government.⁴ This challenge also applies to the right of access to effective remedy for victims of human rights abuses.

The right to an effective remedy for business-related human rights harm is well established in international law and is the third pillar of the United Nations Guiding Principles on Business and Human Rights, which confirms that victims must have access to an effective remedy, and that the state has a duty to ensure that an effective judicial remedy is available.⁵

The purpose of this policy brief is to explore the binding constraints that prevent the enjoyment of the right of access to effective remedy with specific reference to victims of business-related human rights abuses in Uganda, focusing majorly on the mining and oil industries.

2. The right of access to effective remedy in the context of business and human rights in Uganda

Governments are obliged to protect their citizens from human rights abuses, including those connected with business activity. In real terms, a government's obligation to protect human rights in the context of business activity "requires taking appropriate steps to prevent, investigate and redress such abuse through effective policies, legislation, regulation and adjudication".⁶ Governments are also obliged to effectively enforce that legal framework once it is in place, to prevent abuse, and to ensure accountability and redress where abuses do occur.⁷

Many developing states like Uganda have, in general, faltered in their duty to protect human rights by failing to ensure that victims have access to effective remedies, including judicial remedies, particularly for business-related human rights abuses. The resulting lack of access to judicial remedies has a considerable impact on the effective exercise of human rights.⁸ The abuses of human rights in the context of business and human rights have been pervasive, particularly in the oil and mining sectors, and include

extrajudicial killings and the violation of the right to life, illegal and compulsory acquisition of property with inadequate or no compensation⁹ violating the right to property, threats to personal safety and security, deprivation of housing for individuals and communities, and contamination of the environment, thus affecting the right to clean food and water.¹⁰ The United Nations Guiding Principles on Business and Human Rights (UNGPs), developed in response to global concern over businesses' impact on human rights and adopted by the United Nations in 2011, rest on three pillars: the state duty to protect human rights; the corporate responsibility to respect human rights; and access to remedy for those whose rights have been violated. Guiding Principle 25 identifies that

As part of their duty to protect against business-related human rights abuse, states must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within the territory and/or jurisdiction those affected have access to remedy.¹¹

3 *Steep Rise in Allegations of Human Rights Abuse as Boom in Investment Brings Hope of Prosperity Business and Human Rights in Eastern Africa: A Regional Briefing Paper April 2014*.

4 Steven Ratner, 'Corporations and human rights: A theory of legal responsibility' (2001) (3) 111 *The Yale Law Journal* p. 446

5 Skinner, McCorquodale and De Shutter, *International Corporate Accountability Roundtable, 'The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Businesses'* (2013).

6 UN Commission on Human Rights, "Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Annex, I.A.1," A/HRC/17/31, March 2011.

7 "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect, and Remedy' Framework," New York, 2011, B.3.

8 Skinner, McCorquodale and De Shutter, *International Corporate Accountability Roundtable, 'The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Businesses'* (2013)

9 See *Baleke Kayira & 4 Ors v Attorney General & 2 Ors*. [2002] UGHC 52, Civil Suit No. 179, where Ugandan soldiers allegedly beat up and killed villagers and destroyed their possessions, homesteads and food as they carried out an illegal eviction.

10 See *Uganda Human Rights Commission, 'Oil in Uganda. Emerging Human Rights Issues' December 2013*, which comprehensively reviews various allegations of property damage and expropriation without adequate compensation and water resource contamination in areas of Nebbi, Hoima and Buliisa districts.

11 *The Guiding Principles on Business and Human Rights refer to the responsibility of "business enterprises" to respect human rights. Special Representative on Business and Human Rights, United Nations Guiding Principles on*

The UNGPs support the implementation of the 'Protect', 'Respect' and 'Remedy' trichotomy that provide for states to protect human rights as well as for businesses and corporations to respect human rights, put emphasis on appropriate and effective remedies to match rights and obligations, and is anchored in the international human rights law tripartite typology of securing human rights obligations, with states having the primary obligation to respect, protect and fulfil human rights.¹²

Uganda is currently a host state to numerous MNCs, and several of these companies are involved in the mining and oil sectors, which are the sectors receiving the highest amount of FDI. Many of the legal and regulatory frameworks limiting and regulating corporate activity are state-based. However, several states in the developing world have derisory labour, environmental and general human rights records, and businesses have free rein to carry out business in what they determine is the most "efficient" possible way. The existing international human rights law framework, coupled with an effective national legislative, policy and institutional framework, can play a very instrumental role

3. Legal and policy frameworks for access to effective remedy

As happens in many developing countries, Uganda's issues with access to effective remedy mainly lie, not in the content of their laws, but in the enforcement of law, access to justice and implementation of judicial decisions.

The Ugandan Constitution provides that any "person who claims that a fundamental or other right or freedom guaranteed under this Constitution has been infringed or threatened, is entitled to apply to a competent court for redress".¹⁶ The rights for which access to remedy is guaranteed by the constitution range from civil and political rights to economic, social and cultural rights. The constitution further guarantees the independence of the judiciary and the existence of an appeals process, all of which are tenets of an effective state-based judicial mechanism.

There have been landmark cases which have been brought against businesses and other corporate actors, including a 2013 case against Kaweeri Coffee Plantation, a subsidiary of Neumann Kaffee Gruppe, in

in ensuring that Uganda meets its obligation to protect the rights of its citizens. Where human rights harm does occur, victims should have access to remedy. This can take place through state-based judicial or non-judicial mechanisms and non-state grievance mechanisms, at the operational or community-based levels. Across these paths of remedy, the Ugandan state has a responsibility to ensure authenticity and effectiveness.¹³

Although governments have a primary responsibility to ensure respect for human rights, corporations also have a number of responsibilities, as increasingly recognised by international law and other norms. These norms reflect an expectation that corporations should have policies and procedures in place that ensure human rights abuses do not occur and that they undertake adequate due diligence to identify and effectively mitigate human rights problems.¹⁴ The UN Guiding Principles describe many of the basic steps that companies should take to respect human rights, avoid complicity in abuses, and help ensure an adequate remedy for them if they occur.¹⁵

which the respondent was ordered to pay €11 million in compensation and damages for illegal land evictions;¹⁷ and the case where an NGO, Sexual Minorities Uganda, received a permanent injunction against the newspaper Rolling Stone in Uganda which had sought to publish names, home addresses and other personal details of gay rights activist, leading to the death of one of the activists, David Kato, who was murdered at his home.¹⁸

It is also noteworthy that under the new Companies Act of 2012 in Uganda, individuals within a company can be prosecuted for criminal activity by lifting the corporate veil.¹⁹ Courts are increasingly becoming a forum for those aggrieved by corporate conduct to seek redress, though legal and structural obstacles remain in a region where most people have limited understanding of the courts and their rights, and little or no access to legal services.²⁰ However, despite these few successes, there continue to exist various legal and practical barriers to accessing effective remedy for victims of business-related human rights violations.

¹² Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran, *International Human Rights Law* (1st edn, Oxford University Press 2014), p. 101.

¹³ Gabriella Wass and Chris Musiime, 'Protect and Remedy: Implementing State Duties under the UN Framework on Business and Human Rights' (ActionAid International and IPIS 2013), p. 21.

¹⁴ Human Rights Watch, 'How can we survive here?' *The Impact of mining on human rights in Karamoja*, 2014

¹⁵ UNGPs

¹⁶ Republic of Uganda (1) (1995), *The Uganda Constitution*, Article 50(1).

¹⁷ *Baleke Kayira & 4 Ors v Attorney General & 2 Ors*. [2002] UGHC 52, Civil Suit No 179.

¹⁸ Business and Human Rights Resource Centre, *Annual Briefing: Corporate Accountability*, June 2012,

¹⁹ The Republic of Uganda (10), *The Companies Act*, 2012.

²⁰ *Steep Rise in Allegations of Human Rights Abuse as Boom in Investment Brings Hope of Prosperity Business and Human Rights in Eastern Africa: A Regional Briefing Paper April 2014*

The rosy picture painted by the existence of legal provisions promoting access to effective remedy is quickly smudged by the practical barriers to justice. In the first instance, the length of time that matters take to be heard and concluded within the judicial system remains prohibitive. Street Law Uganda, an NGO, notes that it takes years to hear and conclude a matter in a court of law and the mobbing and plethora of cases in courts make the judicial system distasteful and vexing.²¹ This is exacerbated by the inability of courts to follow up and ensure that their orders, especially relating to compensation, are being implemented in a timely fashion. Even where compensation is paid, local people have not been adequately prepared for receiving the funds and, as a result, squander them rather than using the revenues to develop their communities.²²

Closely related to this is the cost of litigation, which is prohibitive too. Corporate and other business entities can afford to tie up complaints in lengthy litigation procedures for which they can afford to pay the best lawyers that money can get them. Conversely, the most affected victims of corporate human rights abuses within the mining and oil sectors are the poorest and most marginalised people in Uganda, namely the Karimojong in Karamoja and locals in the small towns of Kabaale, Kaiso, Tonya and other oil-producing areas of Bunyoro. These victims are unable to afford legal assistance and, thus, find themselves unable to claim their right to an effective remedy, even when they are aggrieved.

Uganda's 2013 National Land Policy contains very progressive language regarding the rights for minorities and, more specifically, for customary landowners, and it calls on the government to protect the rights to the ancestral lands of ethnic minority groups and give them prompt, adequate and fair compensation for displacement by government action.²³ However, some farmers in oil-rich regions state that they are being inadequately compensated for the destruction

of their crops during oil exploration and displacement for petroleum operations, with dissatisfaction about compensation stemming from government and company secrecy about planned oil drilling.²⁴ Displacement of residents and destruction of cultural sites have been reported and it has been alleged that force has been used against residents who attempted to lay claim to land rights and that claims for effective remedy for land rights have gone unanswered.

Uganda's constitution and the African Charter on Human and Peoples' Rights (Banjul Charter) guarantee every person the right to a clean and healthy environment. The government is mandated to enact laws that protect and preserve the environment from degradation and to hold natural assets in trust for the people of Uganda.²⁵

Mining activities in Uganda are controlled under the 2003 Mining Act and the 2004 Mining Regulations and these do not require any form of consent or consultation with local communities prior to the application or acquisition of an exploration licence. While they do require a mining lease applicant to negotiate a surface rights agreement prior to the granting of a mining lease, they do not require this for an exploration licence application and, ultimately, the law falls well short of protecting free, prior and informed consent rights.²⁶

Research undertaken by Human Rights Watch indicates that mining companies in Karamoja did not receive, or even seek, the permission or consent of the indigenous landowners prior to undertaking exploration on their land. When gardens were damaged by excavators or due to trenching, landowners received some compensation. However, when sampling uprooted just a few crops, there was no compensation.²⁷ The inability of government structures to enforce the law on the books continues to dog the promotion of human rights and the ability of victims of abuse to access effective remedy.

²¹ *Street Law Uganda: Street Law (Uganda) is a non-profit making organisation established in Uganda in 2000 engaged in, among other projects, human rights education at national and local levels.* <http://streetlawuganda.org>

²² *Steep Rise in Allegations of Human Rights Abuse as Boom in Investment Brings Hope of Prosperity Business and Human Rights in Eastern Africa: A Regional Briefing Paper April 2014*

²³ *Ministry of Lands, Housing and Urban Development, "Uganda National Land Policy", Final Draft, February 2013, art. 57*

²⁴ *Steep Rise in Allegations of Human Rights Abuse as Boom in Investment Brings Hope of Prosperity Business and Human Rights in Eastern Africa: A Regional Briefing Paper April 2014.*

²⁵ *The Constitution of the Republic of Uganda, 1995, chapter 27.*

²⁶ *The Mining Regulations, arts. 38-42.*

²⁷ *Human Rights Watch, 'How can we survive here? The Impact of mining on human rights in Karamoja', 2014.*

4. Recommendations

In the context of potentially harmful industries such as oil exploration and mining, both the government and companies need to assess the potential human rights impacts of proposed new operations before allowing them to go forward.²⁸ The UNGPs describe many of the basic steps that companies can take to respect human rights, avoid complicity in human rights abuses, and help ensure access to an adequate remedy for them if they occur.²⁹ They also reflect an understanding that

firms, especially in risk-prone rural environments like Karamoja, Mubende and Bunyoro, need to develop effective policies to prevent, detect and respond to human rights abuses – not just deal with problems if they occur.³⁰

Below are some key recommendations on addressing the binding constraints preventing the fulfilment of the right to an effective remedy in the context of corporate human rights abuses.

5. Conducting human rights impact assessments

Ugandan laws do not require any social or Human Rights Impact Assessments (HRIAs), though this is an important aspect of ensuring protection and should be remedied. Such valuations and due diligence assessments should be required before any exploration work is scheduled to begin and involve meaningful and sustained engagement with the communities. Most likely, HRIAs could be accomplished by amending the Mining Act to make provision for these as well as the oil laws and regulations. The Uganda Human Rights Commission (UHRC) should take the lead in preparing guidelines and regulations for these due diligence obligations, pre-qualify a list of independent experts to support corporates and set up a tribunal to evaluate the HRIAs in much the same way that the National

Environmental Management Authority (NEMA) carries out Environmental Impact Assessments (EIAs). These assessments would go a long way in ensuring minimal effects of mining and oil exploration activities on the human rights of the communities and also make provision for robust mechanisms for accessing effective remedy should abuses occur. In the alternative, the integration of social and environmental risks into the current due diligence processes carried out by mining and oil companies before extraction would be enabling, especially if these are in line with international best practice for comprehensive and transparent social and environmental impact assessments that overtly address human rights concerns.

6. Subscribing to the Extractives Industry Transparency Index (EITI) to foster transparency and access to information

An improved environment for transparency and accountability would be a remarkable step towards addressing human rights violations within the extractives industry and, specifically, in oil extraction and mining. Uganda needs to join and subscribe to the Extractives Industry Transparency Index (EITI). The EITI is a multi-stakeholder coalition initiative of governments, companies, civil society groups,

investors and international organisations that aims to ensure openness and strengthen governance on financial transactions in the extractive industry.³¹ Imperatively, the National Oil and Gas Policy enjoins the state to participate in and implement principles of the Extractive Industries Transparency Index (EITI), having regard to transparency and accountability as its guiding principles.³² This is in tandem with various

²⁸ The Guiding Principles note that companies should possess "a human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights."

²⁹ UNGPs

³⁰ The Guiding Principles on Business and Human Rights, pp. 13-25.

³¹ See www.eiti.org

³² Republic of Uganda, National Oil and Gas Policy, 2008 at page 48; the EITI is a coalition initiative of governments, companies, civil society groups, investors and international organisations that aims to ensure openness on financial transactions in the extractive industry. See www.eiti.org (Last accessed 22 August 2017)

recommendations, including the recommendations by the Institute for Human Rights and Business (IHRB) in its submission to the United Nations Human Rights Council for the Universal Periodic Review Session for Uganda in March 2011.³³ However, the laws that implement this policy remain silent on EITI membership and Uganda has shown no interest in participating in EITI standardisation, which is seen as an industry best practice to promote transparency and accountability for oil corporations.³⁴ The realisation that such mismanagement is made all the more possible when the amount and use of natural resource revenues are hidden from the public has spurred a focus on transparency as a tool to help combat corruption and improve governance. Important areas for transparency in resource-rich countries include revenues, contracts, spending and public access to information.³⁵ Ugandan government officials, including President Museveni, have stated a willingness to join EITI³⁶ and in October 2011 Uganda's Parliament passed

a resolution affirming the need to join. Several years later, Uganda is not yet a candidate. Moreover, there is no concrete timeline for when Uganda will begin to take steps to join, representing a missed opportunity, particularly as the EITI rules require participating countries to publish contracts and company ownership information, not only revenue information. Increased access to contracts and other relevant information would be vital for victims of human rights abuses to access effective remedy. Uganda has also not sought to join the international Open Government Partnership, an initiative that aims to secure concrete commitments from governments to enhance openness about government activities, encourage citizen participation, and draw on technology as means to combat corruption and strengthen governance.³⁷ There is need to concretise these intentions by government in a bid to improve the promotion and protection of the rights of Ugandans affected by oil exploration and mining.

7. Conclusion

Commercial globalisation poses substantial challenges to the 'Westphalian paradigm of human rights protection' provided for under constitutional and international law, allocating obligations to protect, respect and fulfil human rights within and between states. However, there is evidence of development in the business and human rights arena with a focus not only on the protection of human rights by states and corporations but also on ensuring that adequate remedy is available for victims of human rights abuses to access justice. An evaluation of the domestic legal, policy and other regulatory frameworks in Uganda on the provision, protection and adequacy of the right of access to effective judicial remedy denotes the existence of a rather deficient and imperfect framework that provides trifling avenues for sufficient corporate accountability, not least in the oil and mining sectors. It is correspondingly manifest, therefore, that there

is great room for improvement through integrating human rights-based approaches into the regulatory framework. This, alongside promoting the enforcement of the existing law in the books, makes the role of domestic jurisdictions in ensuring adequate access to effective judicial remedy for victims of business-related human rights abuses not only perfunctory but also paramount. It is imperative; however, that access to the available remedies for victims of corporate human rights violations is propped up through the introduction of HRIAs as mandatory components of due diligence obligations for MNCs before they can proceed with an investment. There is also need for the state to implement the EITI standards as expressed in the National Oil and Gas Policy. These cannot be overemphasised, bearing in mind that transparency plays a pivotal role in ensuring adequate corporate accountability and justice for victims of business-related human rights abuse.

³³ Institute for Human Rights and Business, *Submission to the United Nations Human Rights Council Universal Periodic Review: Uganda, March 2011*, page 6. Available at https://www.ihrb.org/pdf/Uganda_UPR_14March2011-IHRB-FINAL.pdf (Last accessed 22 August 2017)

³⁴ Gabriella Wass and Chris Musiime at 23.

³⁵ Human Rights Watch, 'How can we survive here?' *The Impact of mining on human rights in Karamoja*, 2014.

³⁶ 'Museveni, Donors discuss electoral reform,' *New Vision*, May 7, 2013, <http://www.newvision.co.ug/news/642406-museveni-donors-discuss-electoral-reform.html> (accessed December 31, 2013);

³⁷ Bernard Sabiti, 'Why Uganda has not joined the Open Government Partnership,' *Open Government Blog*, March 11, 2013, <http://blog.opengovpartnership.org/2013/03/why-uganda-has-not-joined-the-open-government-partnership/>

KONRAD-ADENAUER-STIFTUNG

51 A, Prince Charles Drive, Kololo

P.O.Box 647 Kampala, Uganda

E: info.kampala@kas.de

T: +256 393 262011/2

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