



**BUSINESS, HUMAN RIGHTS AND UGANDA'S OIL AND GAS INDUSTRY:
A BRIEFING OF EXISTING GAPS IN UGANDA'S OIL AND GAS LAWS**

JULY 2015

BUSINESS, HUMAN RIGHTS AND UGANDA'S OIL AND GAS INDUSTRY

A BRIEFING OF EXISTING GAPS IN THE
LEGAL AND POLICY FRAMEWORK

Avocats Sans Frontières (ASF) is an international non-governmental organisation. Its mission is to independently contribute to the creation of fair and equitable societies in which the law serves society's most marginalised and vulnerable groups. Its principle aim is to contribute to the establishment of institutions and mechanisms allowing for independent and impartial access to justice, capable of assuring legal security, and able to guarantee the protection and effectiveness of fundamental rights (civil and political, economic and social).

KAMPALA OFFICE

Plot 832 Old Kira Road, Bukoto,
P.O. Box 36710 Kampala
Tel. +256 (0) 393 265 842

HEADQUARTERS

Rue de Namur 72 Naamsestraat
1000 Brussels - Belgium
Tel. +32 (0)2 223 36 54

www.asf.be

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INTRODUCTION

In 2006 actual oil discovery was estimated at 800 million barrels of oil. Although full-scale production is not expected to start until 2016 - 2017, oil is already central in Uganda's long term planning agenda, as well as a prominent political issue. If effective oil production can be sustained throughout the upcoming decade, the country will earn over \$2 Billion in annual revenue for the next 20 years. This anticipated boost to national income offers Uganda a unique and exciting chance to alleviate poverty and create broad-based development and improved standards of living across the country.¹ The oil and gas sector is likely to spur continued economic growth through the creation of jobs, and investment opportunities while increasing the countries savings on oil imports.

As the extractive industries continue to generate a major source of revenue in both developed and developing nations, like Uganda, the requirement for transnational oil companies to respect human rights has increasingly become a significant topic of national and international discussion. International experience points to challenges which are often faced by resource-rich developing countries in translating mineral wealth into peace and prosperity.² Guarding countries against the "resource curse" calls for a move beyond corporate social responsibility to include respect for and protection of human rights, access to effective remedies and grievance mechanisms, and ensuring that no one is left out of these efforts, including indigenous communities.

This analysis underscores the nexus between business and human rights in the development of Uganda's oil and gas industry, and the possibility to seek remedies for human rights violations stemming from industry activities using the country's legal and policy framework. This analysis seeks to determine whether Uganda's oil and gas legislation is compliant with the United Nations Guiding Principles on Business and Human Rights.³ The United Nations Guiding Principles on Business and Human Rights (UNGPs) are a global standard for preventing and addressing the risk of adverse impacts on human rights linked to business activity.

The analysis will therefore benchmark Uganda's legal and policy framework, including the Petroleum (Exploration, Development and Production) Act, the Petroleum (Refining, Conversion, Transmission, and Midstream Storage) Act, the 2012 Oil and Gas Revenue Management Policy among others against the United Nations Guiding Principles on Business and Human Rights to determine the country's compliance.

¹ International Alert, *Oil and Gas Laws in Uganda: A Legislators Guide*, (Kampala: International Alert) 2011 (9).

² Ibid.

³ United Nations, *Guiding Principle on Business and Human Rights to Implement the United Nations 'Protect, Respect and Remedy' framework*. (Switzerland: United Nations Human Rights Council).

BUSINESS AND HUMAN RIGHTS IMPACTS IN THE OIL AND GAS INDUSTRY

Human rights are the basis for securing dignity and equality for all people.⁴ Broadly, the human rights “bill of rights” is made of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.⁵ These international instruments set out a range of rights and freedoms such as protection from deprivation of property, right to education, the right to favourable conditions of work, to a clean and healthy environment, and to an effective remedy, among others. There is evidence that transnational oil companies that respect human rights tend to have strong health and safety performance, reduced environmental effects from their operations, and become more acceptable by local communities within their operational jurisdictions, while, those that show no interest in protecting human rights face hostilities in their areas of operation leading to the denial of a social license to operate, face operational delays, reduced employee satisfaction, lawsuits and a reputational harm and limited investment expansion and opportunities.

In recent years, a number of transnational oil companies have joined the government and civil society to establish multi-stakeholder initiatives aimed at maximizing positive human rights impacts and preventing negative ones in the sector. Such initiatives include the Extractive Industries Transparency Initiative (EITI), the Voluntary Principles for Security and Human Rights, and the Global Oil and Gas Industry Organization for Environmental and Social Issues. Domestication of these principles and initiatives into national laws and policies is critical to the full realization of the “Protect, Respect and Remedy” framework of the UN Guiding Principles on Business and Human Rights.

THE THREE PILLARS OF THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS

- i. The State duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation, and adjudication.
- ii. The corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved.
- iii. The need for greater access by victims to effective remedy, both judicial and non-judicial.

⁴ European Commission, ‘Oil and Gas Sector Guide on Implementing the UN Guidelines on Business and Human Rights.’

⁵ 1995 Constitution of Uganda, Chapter 4. Other legally binding international conventions complement these core documents, as do regional human rights charters.

The UN Guiding Principles are organized under three pillars of the "*Protect, Respect and Remedy*" framework which emphasizes the multi-stakeholder nature of the issue and avoids the failed attempt of the *Norms* to impose an expansive array of state responsibilities into business. The UN Guiding Principles are in line with other international obligations and further elaborate the implications of existing standards and practises for States and businesses. They are related to the principles of the human rights based approach including participation, accountability, equality and non-discrimination, transparency, rule of law and respect for human rights, among others, which are embedded in Uganda's 1995 constitution as amended.⁶

UGANDA'S COMPLIANCE WITH THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS

Transnational oil companies can profoundly impact the human rights of employees, consumers and host communities in both a positive and negative way. Positively, they could increase local and national employment opportunities; improve access to public services and shared infrastructure such as roads, health facilities, markets for their agricultural products, education, small business enterprise development, tourism, water among others. Negatively, a weak and unresponsive human rights policy and legal regime could lead to polluting of the environment; underpaying workers, forcibly evicting communities without adequate compensation leading the proverbial resource curse.⁷

1. TRANSPARENCY AND ACCOUNTABILITY

Openness and access to information that enables stakeholders to participate in the sector is the foundation of good governance for the oil and gas industry. According to a report by Global Witness,⁸ in addition to promoting good governance and accountability in the oil and gas sector, joining the emerging global transparency standard for the extractive industries revenues accords Uganda an opportunity to protect its citizenry against the predatory practices of transnational oil companies, promotes respect for the rights of host communities within the exploration and production areas, and provides recourse to justice where human rights are violated by the actions of transnational oil companies and their agents.

⁶ The Republic of Uganda Constitution, 1995: National Objectives and Directive Principles (IX, X, XII) and Article 20.

⁷ Sala-I-Martin, Xavier and Arvind Subramanian "*Addressing the Natural Resource Curse. An Illustration from Nigeria.*" IMF Working Paper (2003).

⁸ Global Witness, '*Uganda's oil laws: Global witness analysis*' <https://www.globalwitness.org/archive/ugandas-oil-laws-global-witness-analysis/> (accessed on 29th June 2015).

a. Breached commitment to join EITI

Under the 2008 National Oil and Gas Policy, the government of Uganda committed to joining the global Extractive Industries Transparency Initiative (EITI).⁹ The EITI promotes open and accountable management of the oil, gas and mining industries through strengthening of government's governance systems and encourages public participation in holding governments as trustees of their natural resources accountable. This commitment was renewed under the 2012 Oil and Gas Revenue Management Policy.¹⁰ Unfortunately, this commitment is not reflected in the upstream,¹¹ midstream and most importantly, in the revenue management law, yet prior to the promulgation of these laws, government had repeatedly emphasized the need to harmonize its legislation with the EITI standards and process before joining the initiative.

b. Companies' failure to disclose payments to Government

The three transnational oil companies operating in Uganda (Tullow, CNOOC¹² and Total) are currently not required to disclose information regarding the payments they make to the government. The EITI standards require that data on payments should be disaggregated by payment type, government agency and by project. Where this information is not disclosed, it becomes difficult for stakeholders to hold the government accountable. Tullow Oil is the only company that has, since 2012, voluntarily disclosed payments made to the government.¹³

c. Non-Disclosure of payments received by Government

The Public Finance Management Act requires the Minister of Energy and Mineral Development to present to Parliament both semi-annual and annual reports of the Petroleum fund,¹⁴ inclusive of both actual, cash-inflows and out-flows of the petroleum fund. There is however no requirement for the Minister to ensure that such payments be disaggregated in accordance with the EITI standards stipulating the payment type, origin and source project. This makes it impossible to follow company payments with government receipts since the national budget recognizes only one single figure from the oil and gas industry.

9 The National Oil and Gas Policy for Uganda 2008. Objective 6(h) (iii) and Objective 7.2.61 (b) (xiv). <http://www.petroleum.go.ug/uploads/resources/17.NATIONALOILANDGASPOLICYFORUGANDA.pdf> (accessed June 15th, 2015).

10 The Oil and Gas Revenue Management Policy 2012. Point 6.5 and Appendix 1E: Governance. <http://www.petroluem.go.ug/uploads/resources/18.RevenueOilRevenueMgtPolicy.pdf>. (accessed June 15th, 2015).

11 The Petroleum (Exploration, Development and Production) Act 2013. <http://petroleum.go.ug/policies/view/7/The-Petroleum-Exploration-Development-and-Production-Act-2013> (accessed June 17th, 2015).

12 China National Offshore Oil Corporation.

13 Extractive Industries Transparency Initiative, The EITI Standard <http://eiti.org/document/standard> (accessed on June 22nd, 2015).

14 The Public Finance Management Act: Section 61 (1) (b) (i-iv).

d. Unclear payments of sub-national royalties

Under the Public Finance Management Act, local governments are entitled to 6% of petroleum royalties while cultural or traditional institutions located within the exploration and production areas receive a meagre 1%.¹⁵ There is no individual reporting line for these payments to enable local communities and subjects to hold their local governments accountable for such monies. Government's commitment to allocate such revenue in accordance with the local government budget lines makes it complicated for ordinary stakeholders within these districts to know if the local governments are getting a fair share thereof.

e. Opaque licensing allocation process

There is a commitment to an open, transparent and competitive licensing process reflected in the upstream law.¹⁶ However the Minister of Energy and Mineral Development is accorded unfettered powers to circumvent the bidding process in certain instances. The law¹⁷ does not provide criteria for prequalifying bids, rendering the process susceptible to abuse and corruption. The technical and financial criterion applicable in the selection process has not been disclosed.¹⁸

f. Disclosure of information about beneficial ownership

There is a requirement under the upstream law for the disclosure of information by applicants in a bidding process about beneficial ownership. Aside from a failure to demonstrate that once such disclosure is made, the same shall be made public; the law is silent on the actual definition of "beneficial ownership."

g. Non-Disclosure of production sharing agreements and other contracts

Contrary to the provisions of the Access to Information Act,¹⁹ the government has unwaveringly declined to disclose Production Sharing Agreements (PSAs), on the basis of confidentiality clauses in the contracts. Sections 152 and 153 of the upstream law²⁰ stipulate that information submitted by the transnational oil companies to government should be kept confidential unless the parties thereto agree to the disclosure, though consent should not be unreasonably withheld. Government employees are subjected to an oath of secrecy and strict penal sanctions for breach of that oath.

¹⁵ The Public Finance Management Act: Section 75.

¹⁶ The Petroleum (Exploration, Development and Production) Act 2013. Section 42.
<http://petroleum.go.ug/policies/view/7/The-Petroleum-Exploration-Development-and-Production-Act-2013>
(accessed on June 23rd, 2015).

¹⁷ The Petroleum (Exploration, Development and Production) Act 2013. Section 56 & 76.
<http://petroleum.go.ug/policies/view/7/The-Petroleum-Exploration-Development-and-Production-Act-2013>
(accessed on June 25th, 2015)

¹⁸ The Petroleum (Exploration, Development and Production) Act 2013. Section 151.
<http://petroleum.go.ug/policies/view/7/The-Petroleum-Exploration-Development-and-Production-Act-2013>
(accessed on June 25th, 2015).

¹⁹ Act of 2005 Laws of Uganda.

²⁰ Petroleum (Exploration, Development and Production) Act for Upstream, 2013.

While the government should honour its commitment to fully join the EITI and make it an open policy to publish all the contracts on the line ministry's website, there is also need for the transnational oil companies to publicly demonstrate their willingness to disclose information. This will be a big step in managing public expectations but also demonstration of the government's political will to be held accountable by its citizens.

2. STATE/PUBLIC PARTICIPATION UNDER THE UPSTREAM AND MIDSTREAM LAW

The government should pursue opportunities for local and national benefits and account for, mitigate and offset the environmental and social costs of resource extraction projects.²¹ It is through such efforts that, natural resource exploitation can transform into the desired economic multiplier effects for Ugandans. This principle presupposes deepening the principle of Free, Prior and Informed Consent (FPIC) through the involvement of local communities in decision-making and assessment through the planning, execution and closure of projects. Government works with citizens at both local and national levels to determine ownership and access rights over surface and sub-surface interests and rights to the subsequent revenues. Measuring and mitigating the negative effects of extraction, creating opportunities to develop local benefits from extraction, while communicating with members of the local government, cultural institutions and strengthening their capacity in the overall management of oil and gas resources as stakeholders.

a. The 2008 Oil and Gas Policy

One of the guiding principles of the 2008 Oil and Gas Policy²² is to create lasting benefits for Ugandans. The policy states that government shall ensure that it collects the right revenues; uses them to create lasting value for the entire nation; ensure optimum national participation in oil and gas activities; support the development and maintenance of national expertise; ensure that oil and gas activities are undertaken in a manner that conserves the environment and biodiversity and ensures mutually beneficial relationships between all stakeholders in the development of a desired oil and gas sector for the country. The UN Guiding Principles on Business and Human Rights are reflected in the objectives of the 2008 Oil and Gas Policy.

b. The Petroleum (Exploration, Development and Production) Act, 2013

The long title of the Petroleum Act²³ states that its purpose is operationalize Article 244 of the Constitution by creating the governance structures of the industry, which include the Petroleum Authority and the National Oil Company all charged with oversight over the exploration, development and production of the oil and gas resources. The long title also seeks to create an environment for open, transparent and competitive licensing and restoration of derelict lands among others. According to Section 4(2),²⁴ petroleum rights are held by government on behalf and for the benefit of its people.

²¹ Natural Resource Charter, second edition: Precept 5.

²² National oil and Gas Policy for Uganda 2008. Popular Version, April, 2014.

²³ Petroleum (Exploration, Development and Production) Act, 2013.

²⁴ The Petroleum (Exploration, Development and Production) Act, 2013.

This provision needs reassertion in the form of a constitutional amendment to eliminate any suspicions between the people and their government about benefits of petroleum. Vesting petroleum and minerals in the “State”²⁵ which embraces all state institutions such as the Human Rights Commission, beyond the limited interpretation of “government”, which in Uganda’s denotes the Office of the Presidency, could create a more accountable environment for other stakeholders’ participation in the formulation of the requisite policy and regulatory framework.

c. Compliance with Environmental Principles

The Upstream Act²⁶ charges the National Environment and Management Authority (NEMA) with the responsibility of making regulations for the management of the production, transportation, storage, treatment and disposal of waste arising out of petroleum activities. However, the prescribed fine of five thousand currency points in Section 3 (9) is not dissuasive enough. Raising the fine to one hundred thousand currency points as prescribed in Section 3 (7) could guard against non-compliance by licensees. It is also important to note that there is no legal requirement for the Minister of Energy and Mineral Development to publicly disclose the outcomes of an assessment of the impact of the petroleum activities on trade, industry and the environment and other risks such as pollution, or economic and social costs. Although an assessment is required under Section 47 (3)²⁷ for new licensing areas, there is no provision for similar assessments provided for in the other stages of resource development for interested stakeholders to comment. Even though the affected communities are accorded an opportunity to express their views on new areas of exploration, their fate is left in the hands of the Minister who may disregard their interests (Section 47 (6)).

The Upstream Act fails to make provisions for public disclosure of Environmental Impact Assessments (EIAs). This perpetuates lack of information and infringes on citizens’ right of access to information regarding enjoyment of a clean and healthy environment (Article 39).²⁸

d. Agreements with government under the Upstream Law²⁹

The Minister for Energy and Mineral Development is required to present Parliament with the Model Production Sharing Agreements and any other agreements signed by the government and international oil companies.³⁰ The Upstream law does not provide penalties for failure to disclose Model Production Sharing Agreements to Parliament and as such, the government has consistently refused to make these agreements available to Cabinet in violation of the constitutional right of access to information,³¹ yet the transnational oil companies claim to have no objection to the government’s disclosure of these agreements.³²

25 Global Forum: What is a State: <https://www.globalpolicy.org/nations-a-states/what-is-a-state.html> (accessed on June 25th, 2015).

26 Petroleum (Exploration, Development and Production) Act for the (Upstream), 2013.

27 Ibid.

28 The Republic of Uganda Constitution, 1995.

29 The Petroleum (Exploration, Development and Production) Act, 2013.

30 The Petroleum (Exploration, Development and Production) Act, 2013. Section 6 (3-4).

31 The Republic of Uganda Constitution, 1995. Article 41.

32 Global Witness. *How Compliant is Uganda with the key requirements of the Extractive Industries Transparency Initiative*: Unpublished briefing, May 2015.

e. Community development and benefits agreements

The interests of government are best reflected in the Model Production Sharing Agreements. However the social, cultural, environmental and economic interests and rights³³ of resource host communities in oil rich areas are better served under community development and benefit agreements. Petroleum exploration, development and production activities could in theory provide immense benefits to local communities and the country as a whole, but also pose great immediate human rights, social, cultural, and environmental risks. Potential benefits include increased employment across the value chain, stimulation and diversification of the rural economies through the establishment and development of local businesses, potentially leading to sustainable economic development.³⁴ The development of oil and gas resources can also lead to economic inequality, inflation, social disruptions, displacement, housing shortages, social tensions, loss of traditional lifestyles, and significant environmental damage.³⁵

The relative weight of potential benefits and risks of oil and gas exploitation is balanced through government policy and legislation that both facilitate and may inadvertently constrain economic and social development for the communities affected.³⁶ The provisions of Section 6 of the upstream law could be enriched with the inclusion of a sub-section on community development agreements between transnational oil companies and local host communities.

3. NATIONAL OR LOCAL CONTENT OPPORTUNITIES

Local content refers to an increase in the utilisation of domestic labour and businesses by oil, gas and mineral companies, non-tax benefits stay in-country or in the backyards of resource regions and local ownership and capital (equity) in the long-term. Local content is composed of employment skills transfer, technology transfer, business development and competitiveness, greater participation in the extractive sector, development of downstream industries and a quantifiable retained national net product leaving host nations and communities better off than the pre-resource extraction periods.

Local or national content³⁷ (state or public participation in resource exploitation) goes to the root foundation of the right to development and economic rights enshrined in the Ugandan Constitution.³⁸ The National Oil and Gas Policy include two key objectives addressing the country's local content aspirations: Objective 7: to ensure optimum participation in oil and gas activities. Objective 8: to support the development and maintenance of national expertise.

33 The Republic of Uganda Constitution, 1995. Specifically (Articles 37, 39, 40).

34 Van Hinte, et al, *Evaluation of the assessment process for major projects: A case study of oil and gas pipelines in Canada. Impact Assessment and Project Appraisal* (2007), 25(2), 123-137.

35 Sosa, I. and Keenan, K, *Impact benefit agreements between Aboriginal communities and mining companies: Their use in Canada*. (2001).

36 Wright, L and White, J. P, "Developing Oil and Gas Resources On or Near Indigenous Lands in Canada: An Overview of Laws, Treaties, Regulations and Agreements". *The International Indigenous Policy Journal*, 3(2) (2012).

37 The National Oil and Gas Policy, Objective 7 "To ensure optimum participation in oil and gas activities. Objective" and Objective 8 "To support the development and maintenance of national expertise".

38 The Republic of Uganda Constitution, 1995. Article 40 and 45.

a. Training and employment of Ugandans under the Upstream and Midstream Laws

Section 56 (3) (f)³⁹ provides that “an applicant for a petroleum exploration licence is expected to support his application with a statement on how it intends to train and employ Ugandans.” There is however no specific provision in the same law ensuring that, once trained, the same transnational oil companies should absorb the trained Ugandans. Training and employment of Ugandans is further provided for under Sections 126 and 127, which reinforces Section 56 (3) (f) by demanding that the licensee submits to the Petroleum Authority a detailed programme for recruitment and training of Ugandans and transfer of knowledge to Ugandans. However, there are no training and employment targets set within these provisions and nor does the law provide any form of sanctions for non-compliance. These provisions are repeated in the midstream legislation verbatim.⁴⁰

These provisions are to a lesser extent consistent with the provisions of the Model Production Sharing Agreement for Uganda (2006), which has a number of provisions on the employment and training of nationals for the sustainable management of the industry.

Article 21 – Training and Employment

- » Train and employ suitably qualified Ugandan citizens following commencement of Production.
- » Undertake the schooling and training of Ugandan citizens for staff positions, including administrative and executive management positions.
- » Provide grants to support the training of government officials on matters related to the management and oversight of the petroleum sector.

Both the upstream and midstream laws lack provisions that ensure that Ugandans employed by the transnational oil companies receive the same treatment, pay and opportunities at their work place with their foreign counterparts.⁴¹ A recent report by the Office of the Auditor general⁴² revealed that Ugandans working in three transnational oil companies (Tullow Oil, CNOOC and Total) were being underpaid compared to their foreign counterparts. The report discovered that expatriates on average earned five to ten times more than nationals, while other expatriates were found to have overstayed past the due dates for the nationalization of their positions.

39 The Petroleum (Exploration, Development and Production) Act for the (Upstream), 2013.

40 Petroleum (Refining, Conversion, Transmission and Midstream Storage) Act, 2013. Sections 54 and 55.

41 1995 Constitution of Uganda, Article 21.

42 Keith Muhumuza, “Auditor General Faults and Government and Oil Companies on skilling Locals.” <http://www.monitor.co.ug/Business/Auditor--General--faults--government-oil/-/688322/2687092/-/af385ez/-/index.html> (accessed June 30th, 2015).

b. Provision of goods and services by Uganda entrepreneurs under the Upstream and Midstream Laws

Both the upstream and midstream laws require licensee holders in the exploration and refinery phases to give priority to local goods and services provided by Ugandan entrepreneurs. While these laws “give preference” to local goods and services, the term is too broad and subject to abuse by the more sophisticated transnational oil companies. The law allows transnational oil companies to use locally present foreign service providers who have built a long-standing relationship with them in the process clouding out local firms.

Article 20 (Purchases in Uganda) of the Model Production Sharing Agreement provides as follows;

- » Maximize use of local goods and services, where available on a competitive basis.
- » Implement tender procedures that give adequate opportunity for local suppliers to compete.
- » Report achievements in utilizing Ugandan goods and services.

Much as the law demands that transnational oil companies, their contractors and sub-contractors notify local goods and service providers of upcoming contracts as early as possible, there is no specific timeframe within which such information should be made available. This leaves the local firms at the mercy of transnational oil companies, which could elect to provide such information in a time frame that is too late for the suppliers to participate. There are no national content targets, nor standardized procurement procedures for local business entities and no efforts by government at both the central and local government levels to develop the capacity of local suppliers for the oil and gas sector. A recent study commissioned by the Ministry of Energy and Mineral Development ⁴³ defines local content in terms of value addition, implying that ownership of the company performing the value-added activities should not matter. The study further argues, that in a globalized industry, a local subsidiary of a multinational company can be just as effective in using domestic inputs and developing capacity and competence in Uganda as a company in which Ugandans hold a majority of the shares and that national content should be measured as value added covering value generation in both indigenous and foreign owned firms.

⁴³ “Enhancing National Participation in the Oil and Gas Industry in Uganda, 2011.”

4. ENVIRONMENT, LAND COMPENSATION AND SECURITY RELATED HUMAN RIGHTS

The Supreme Court of India in *Susethat Vs State of Tamil Nadu*⁴⁴ has held that there must be a balance between human rights and economic development. As such, the oil and gas laws should be revised to include this precautionary principle in a bid to protect the right to a clean and health environment, and related rights alongside mineral development.

a. Liability for damage due to pollution (upstream and midstream laws)

Principle 4 of the Rio Declaration⁴⁵ and Article 39 of the Constitution of Uganda recognize the right of every person to a clean and healthy environment. To protect this right, the Petroleum Exploration and Production Department Act sets in motion provisions against pollution in Part X thereof. However, Section 131 of the upstream law is ambiguous on liability for pollution damage caused without a licence: "... pollution damage occurs during a petroleum activity and the activity has been conducted without a licence, the party that conducted the petroleum activity is liable for the damage, regardless of fault".

Aside from finding companies liable for pollution, regardless of fault, both the upstream and midstream laws (Section 130 and Section 58 (1)) fail to provide for a compensation regime for victims of such pollution or any losses resulting from poor management of petroleum operations, in particular, the unforeseeable long term damages such may have on the environment and human health. It would appear that according to Section 131 there is no liability for pollution damages if caused with a licence, which legalizes pollution. Liability for pollution damage should accrue with and without a licence. However, there are more clear and detailed provisions in the draft National Environment Management Bill currently under review (clauses 95-100). Clause 100 states that a person (including a legal company) who pollutes the environment, is strictly liable for the damage caused to human health or the environment regardless of fault. In time there will be need to harmonize the upstream legal provisions on pollution control with the principle legislation on environmental management once the proposed bill becomes law.

b. Compensation and displacements

Article 26 of the Constitution provides for the right to protection from deprivation of property and guarantees the right to everyone to own property individually or in association with others. It sets aside conditions for compulsory deprivation of property in public use or in the interest of defence, public safety, public order, public morality or public health. Article 26(2) (b) further provides that there must be prompt payment of fair and adequate compensation, prior to the taking of possession or acquisition of private property. A right to seek a court remedy for any aggrieved party is equally accorded.

Noticeably, there are no specific provisions addressing surface access rights disputes between international oil companies and local communities, nor are there provisions for compensation and resettlement of displaced communities. This has exacerbated conflicts between government, transnational oil companies, and local communities in the oil rich region culminating into court disputes among others.

⁴⁴ Civil Appeal 3418 of 2006.

⁴⁵ Rio Declaration, 1992.

c. Land conflicts and human displacements in the Albertine Graben

The government, transnational oil companies, and international service providers in the oil and gas industry have been faulted for the ever increasing land conflicts in the oil rich region. The existing institutional and legal systems fail to recognize the legal interests and rights of communal land owners in the face of multinational business interests. This has led to an increase in land grabbing, violent evictions and displacement of thousands of communal land owners and consequently a spate of court cases against government.⁴⁶ Oil in Uganda, a local online newsletter reveals an increase in land grabbing, evictions and violent displacements of customary landowners by international business entities in collusion with local businessmen and elites from Kampala.⁴⁷

In operationalizing Article 244 (1) of the Constitution⁴⁸ on minerals and petroleum resources, the Uganda National Land Policy lays down strategies to be implemented by government in ensuring appropriate management and governance of strategic natural resources. The following strategies are set out in Clause 30 of the policy; government is required to:

- i. Protect the land rights and land resources of customary owners, individuals and communities owning land in areas where mineral and petroleum deposits exist or are discovered;
- ii. Allow to the extent possible, co-existence of customary owners, individuals and communities owning land in areas where petroleum and minerals are discovered;
- iii. Provide for restitution of land rights in event of minerals or oil being exhausted or expired depending on the mode of acquisition;
- iv. Guarantee the right to the sharing of benefits by land owning communities and recognize the stake of cultural institutions over ancestral lands with minerals and petroleum deposits; and
- v. Adopt an open policy on information to the public and seek consent of communities and local governments concerning prospecting and mining of these resources.

These provisions appear sufficient to remedy the current injustices faced by customary landowners in the oil rich region and reinforce the right to protection from deprivation of property and to culture and similar rights. However, the decision of government to retain 93% shares from royalties, only relinquishing a paltry 6% to be shared between local governments in the oil producing region may be too little to guarantee the desired financial benefits optimization.⁴⁹ Government rewards cultural institutions with a relatively insignificant 1%, while it completely ignores communal land owners and victims of violent evictions and displacements.⁵⁰

46 Edward Ssekika, "Oil: a year of court battles, slow progress" Weekly Observer, 30th December, 2014 <http://observer.ug/business/38-business/35701--oil-a-year-of-court-battles-slow-progress> (accessed on June 30th, 2015).

47 Oil in Uganda, Oil and Land Conflicts in the Albertine. http://www.oilinuganda.org/wp-content/plugins/downloads-manager/upload/oil_in_uganda_newsletter_march.pdf (accessed on June 30th, 2015).

48 The Constitutional (Amendment) Act No.11 of 2005. Replacement of Article 244 (1).

49 The Public Finance Management Act No.3 of 2015. Section 75.

50 Ibid Section 35.

There is no legal recognition of traditional mechanisms for dispute resolution or customary law as a framework for the processing of disputes under customary tenure. The government must demonstrate the political will to protect and remedy the violations faced by customary land owners. The government should re-instate district land tribunals suspended by the judiciary in 2006 for lack of adequate budgetary support.

The upstream law is explicit on surface rights. Section 135 provides that “a licensee holder cannot exercise any rights under their licence without the written consent of the landowner.” Extensively, the provision attempts to provide for the co-existence of petroleum development with landowners rights; notably Section 136 enables landowners in an exploration area to retain the right to graze stock or to cultivate the surface of the land insofar as the grazing or cultivation does not interfere with petroleum activities or safety zones in the area.

However, Section 138 of the upstream law enables a petroleum production licence holder to acquire exclusive rights over a block in a development area. The law disarms the landowner’s opportunity to negotiate for an enhanced value of their property by subjecting it to the government valuer’s determination. This is because the government valuer is by law instructed to disregard the increase in the value of land as a result of the presence of petroleum. There is also a risk that some landowners may not be compensated for disturbance of their rights and for any damage done to the surface of the land as a result of oil and gas related activities, if complaints or claims are made four years after the fact (Section 139(2) of the upstream law).

d. Security and militarization of the Albertine Graben

Security for the oil and gas development projects in the Albertine Graben is provided by an elite special government military unit and private security firms.⁵¹ The Uganda Human Rights Commission has reported the denial of district labour officers access to oil well pads in Buliisa District, while civil society organisations have complained of illegal detentions and harassment from the security and military in the region.⁵²

Currently the upstream and midstream laws are silent on human rights and there are no set parameters or codes of practice guiding military, police or private security firms in the oil region with respect to human rights. Oil companies are however duty-bound to provide for their own security detail under Sections 143 and 66 of the Upstream and Midstream laws respectively.

51 Haggai Matsiko, “Guns in the oil region” The Independent <http://www.independent.co.ug/cover-story/5968-guns-in-oil-region> (accessed on July 5th, 2015).

52 Uganda Human Rights Commission, “*A Special Report on Oil in Uganda: Emerging Human Rights Issues. Special focus on selected districts in the Albertine Graben*” (2013).

CONCLUSION

This analysis demonstrates that Uganda's oil and gas laws fall short of protecting and promoting fundamental and other human rights and freedoms enshrined in the country's constitutional framework. The analysis also shows that Uganda's current policy and legal regime fails the compliance test, with regard to the UN Guiding Principles on Business and Human Rights. A number of human rights issues are raised, ranging from lack of transparency and accountability in the sector, non-disclosure of information, land conflict and compensation rights violations, labour discrimination between international expatriates and local human resources employed in the international oil companies, security and militarisation of the Albertine Graben, and local business opportunities through the provision of goods and services by local small business enterprises as key to the realisation of the desired sustainable economic development in the country. However it should be noted that economic development does not directly correlate to human development. Therefore deliberate measures need to be taken to ensure that sustainable economic development realises human development.

RECOMMENDATIONS

1. Government should create a legal and policy framework ensuring that exploitation of natural resources is conducted in a manner that respects human rights and freedoms. Oil companies are equally enjoined to respect, protect and provide remedies to victims of their corporate quest for the exploitation of natural resources in Uganda.
2. Before issuing a certificate of compliance in accordance with the provisions of Section 13(6) of the Public Finance Management Act, 2015, the National Planning Authority (NPA) should demand that the Ministry of Energy and Mineral Development provides for the review of the Upstream and Midstream laws to make them human rights compliant in the subsequent National Budget Framework.
3. The legal framework should provide for public disclosure of contracts and environmental impact assessments for accountability purposes and a demonstration by government and international oil companies to provide remedies to those affected by the negative social and environmental externalities of the petroleum industry in Uganda.
4. International oil companies should work closely with government and civil society to consult and secure free, prior and informed consent through community engagement in the conduct of environmental impact assessments in addition to making them and other contracts such as production sharing agreements and signature bonuses publicly accessible without superfluous bureaucratic limitations.
5. The legal framework should be reviewed to ensure that Ugandan local businesses are guaranteed an equitable playing field with regard to employment opportunities in the industry. This will not only guarantee sustainable management of the industry, but lead to a higher Net National Product for Ugandans employed in the industry.
6. The laws should ensure that government establishes a compensation fund. Government should require oil companies to contribute a minimal percentage of their economic rents periodically as part of their human rights responsibilities. Such a facility would be used to provide basic services such as clean water or resettlement of project affected persons. The fund could also be used to indemnify and compensate victims of human rights violations. This is not a matter of corporate social responsibility, but rather human rights.

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