

UNIVERSITY OF ESSEX
SCHOOL OF LAW

LL.M in International Human Rights Law (Economic Relations)
2011/12

Supervisor: Professor Sheldon Leader

DISSERTATION

“A consideration of the human rights impact and implications caused by the tensions created between the public right to information and the commercial rights to privacy and property with respect to oil contracts in Uganda.”

Name: Iain Clarkson
Number of Words: 19,174
Date Submitted: 13th January 2013

Contents

<u>Chapter</u>	<u>Page</u>
Table of cases	i
Table of Treaties, Legislation, and other relevant instruments	iii
Abbreviations	vi
1. Introduction	1
2. Background Information	5
3. Human Rights Impact (Case Studies)	15
Nigeria	
Angola	
Burma	
Indonesia	
Côte d'Ivoire	
4. Access to Information	26
5. Rights to Privacy and Property	38
6. Application in Court	48
7. Analysis	57
8. Conclusion	70
Bibliography	75

Table of Cases

International

International Court of Justice

Case concerning Gabcikovo-Nagymaros (Hungry v Slovakia), 1997 ICJ Rep 7

Human Rights Committee

Liliana Assenova Naidenova et al. v Bulgaria, Communication No. 2073/2011, UN Doc. CCPR/C/106/D/2073/2011

African Commission on Human and Peoples' Rights

155/96 The Social and Economic Rights Action Center and the Center for Economic and Social Rights / Nigeria

313/05: Kenneth Good / Republic of Botswana

European Court of Human Rights

Case of Nada v Switzerland (Application no. 10593/08), Grand Chamber, 12 September 2012

Case of Société Colas Est. and others v France (Application no. 37971/97), Grand Chamber, 16 April 2002

Case of Autronic AG v Switzerland (Application no. 12726/87), Court (Plenary), 22 May 1990

Case of Axel Springer AG v Germany (Application no. 39954/08), Grand Chamber, 7 February 2012

Case of Guerra and others v Italy, (116/1996/932), Grand Chamber, 19 February 1998

Domestic

Australia

Accident Compensation Commission v Croom [1991] 2 VR 322

Searle Australia Pty Ltd v Public Interest Advocacy Centre (1992) 16 AAR 28

Colchovski v Australian Telecommunications Corp (1991) 13 AAR 261

Director of Public Prosecutions v Smith [1991] 1 VR 63

Office of the Information Commissioner

Sexton Trading Company v South Coast Regional Health Authority (1995) 3 QAR 132

Maddock Lonie and Chisholm v Department of State Services [1995] WAIC 15 (2 June 1995)

Nigeria

Gbemre v Shell Petroleum Development Company Nigeria Limited and Others (2005) AHRLR 151 (NgHC 2005)

Uganda

Greenwatch Ltd v Attorney General & Uganda Electricity Transmission Company Ltd, HCCT-OO-CV-MC-0139 of 2001 (High Court of Uganda)

Mpagi v Attorney General, no. 751 of 2009

United Kingdom of Great Britain

Motto et al. v Trafigura [2011] EWCA Civ 1150

Salomon v A. Salomon & Co. Ltd [1897] AC 22

United States of America

Covington and Lexington Turnpike Road Co. v Sandford 164 US 578 (1896)

Doe v Unocal 248 F.3d 915 (9th Cir. 2001)

Federal Communications Commission et al. v AT&T Inc. et al 562 US ____ (2011)

John Doe VIII et al. v Exxon Mobil Corporation et al 473 F.3d 345 (D.C. Cir. 2007)

Kiobel v Royal Dutch Petroleum Co 621 F.3d 111 (2d Cir 2010)

See v City of Seattle 387 US 541 (1967)

Marshall v Barlow's Inc 436 US 307 (1978)

U.S. Department of Justice et al. v Reporters Committee for Freedom of the Press et al. 489 U.S. 749 (1989)

Federal Open Market Comm. v Merrill, 443 U.S. 340 (1979)

Memphis Publishing Company et al. v Federal Bureau of Investigation Civil Action No. 10-1878 (ABJ)

Treaties, Legislation and other relevant instruments

International

Universal Declaration of Human Rights (1948)
Articles 12, 19, 21, 27

International Covenant on Economic, Social and Cultural Rights (1966)

Committee on Economic, Social and Cultural Rights
General Comment No. 14, UN Doc. E/C.12/2000/4

International Covenant on Civil and Political Rights (1966)
Articles 17, 19, 25

Human Rights Committee
General Comment No. 16: The right to respect of privacy, family, home and
correspondence, and protection of honour and reputation (Art. 17): 04/08/1988
General Comment No. 25, UN Doc. CCPR/C/21/Rev.1/Add.7
General Comment No. 31, UN Doc. CCPR/C/21/Rev.1/Add.13
General Comment No. 34, UN Doc. CCPR/C/GC/34

UN General Assembly Resolution 59(I) (1946)
UN General Assembly Resolution 45/94 (1990)

Declaration of the United Nations Conference on the Human Environment, 1972
Principle 1

Guiding Principles on Business and Human Rights, UN Doc. A/HRC/17/31
Principles 3, 26

ILO Convention on Indigenous and Tribal Peoples, 1989 (No. 169)
Article 16(2)

OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal
Data (23 September 1980)

Vienna Convention on the Law of Treaties (1969)
Article 27

UN Convention against Corruption (2005)
Article 13(1)(b)

Rio Declaration on Environment and Development, 1992
Principle 10

Vienna Convention for the Protection of the Ozone Layer, 1985

United Nations Framework Convention on Climate Change, 1994

General Assembly draft Resolution sustainable development, 2012, UN Doc.
A/66/L.56

WTO Agreement on Trade-Related aspects of Intellectual Property Rights
Article 61

Regional

African Charter on Human and Peoples' Rights
Articles 2, 4, 9, 14, 16, 18(1), 21, 24

African Convention on the Conservation of Nature and Natural Resources

African Commission Resolution 167 (XLVII)

Declaration of Principles on Freedom of Expression in Africa 2002
Principle IV

Draft model law for African Union (AU) Member States on Access to Information
Sections 37, 38, 39, 43, 49

Treaty Establishing the East African Community

American Convention on Human Rights
Articles 11, 13

European Convention on Human Rights
Articles 3, 8, 10, 12
First Protocol
Article 1

EU Directive 95/46/EC of the European Parliament and of the Council of 24 October
1995

Domestic

Australia
Freedom of Information Act 1982
Sections 31(1)(c), 34(1)

France
1978 Law on Access to Administrative Documents

Nigeria

Constitution of the Federal Republic of Nigeria
Sections 33(1), 34(1)

The Petroleum (Drilling and Production) Regulations of 1969, contained in the
Petroleum Act 1969
Article 25

Uganda

Constitution of the Republic of Uganda, 1995
Articles 22, 24, 27, 38(1), 39, 41(1), 43(1), 77, 79(3), 105(1), 244

The Access to Information Act 2005
Sections 2, 4, 5(1), 8, 18, 27, 28, 28(1)(a), 34, 34(a), 34(b), 37, 38, 44(1)

The Petroleum (Exploration, Development and Production) Bill, 2012
Sections 5, 9, 57, 123, 124, 127(1), 148, 149(1)(b), 150, 150(4)

The Petroleum (Refining, Gas Processing and Conservation, Transportation and
Storage) Bill, 2012
Sections 39, 55, 56, 60(1), 76, 78, 78(3)

The Petroleum (Exploration and Production) Act 1985
Sections 59, 59(3)

National Environment Act, Cap 153
Sections 3, 4, 5, 6, 56

United Kingdom of Great Britain

Freedom of Information Act 2000
Freedom of Information (Scotland) Act 2002

United States of America

Alien Tort Statute 1789
Dodd-Frank Wall Street Reform and Consumer Protection Act, 2010
Freedom of Information Act as amended in 2007 and 2009

Abbreviations

CESCR	-	Committee on Economic, Social and Cultural Rights
ECHR	-	European Convention on Human Rights
ECtHR	-	European Court of Human Rights
EIA	-	Environmental Impact Assessment
EITI	-	Extractive Industries Transparency Initiative
HRC	-	Human Rights Committee
ICCPR	-	International Convention on Civil and Political Rights
ICESCR	-	International Convention on Economic, Social and Cultural Rights
IMF	-	International Monetary Fund
NOGP	-	National Oil and Gas Policy
PSAs	-	Production Sharing Agreements
UDHR	-	Universal Declaration on Human Rights
UN	-	United Nations
African Charter	-	African Charter on Human and Peoples' Rights
American Convention	-	American Convention on Human Rights
Constitution	-	Constitution of the Republic of Uganda, 1995

Introduction

A nation's prosperity is intrinsically linked to national wealth, as such the purpose of this paper is to consider the human rights impact and implications arising from the potentially lucrative emerging oil sector in Uganda. More specifically it will be looking at the tensions created between the individual right of access to information and the non-human entity's rights to privacy and property.

It will be argued that although people have the right to know what their government is doing on their behalf and how their resources and economy are being managed, this right is not absolute. After consideration, even though it would appear that the law as it is, establishes no positive obligations on the State of Uganda to disclose the basic details of the exploration and exploitation contracts they agree with third party companies, as good practice and a safety precaution to avoid possible human right violations, they should disclose them. Furthermore, even if they don't release the details themselves the information will become available through other means such as the State budget and domestic legislation requiring the companies operating there to disclose details of payments to foreign governments. As a result this author further argues that to achieve the optimal outcome for the people, the answer will not come solely from the legal discipline but politics play a role as well. It will be shown that although there is a need to balance the principles of transparency and accountability of government with the need to protect commercial or business interests, voluntary

disclosure of the sought information might improve the State's image in terms of human rights commitment to the international community after a troubled history and still inconsistent reporting.

As secondary considerations, it will be argued that business has no viable justification for non-disclosure of the Production Sharing Agreements (PSAs) in international human rights law as nothing contained within would likely prejudice the economic prosperity of the companies, which includes trade secrets or other intellectual property that could devalue as a result. Even though there may be contractual obligations of confidentiality contained within the existing PSAs, consideration will be given as to how to reconcile conflicting duties that may drag one party into international arbitration against their wishes. Business, or the State, may be forced to disclose some confidential details as a result of new domestic legislation enacted in the home countries or via court orders; it will be further argued that the result of this would not amount to a breach of trust, confidence or contract. Furthermore, it will be highlighted that a blanket ban restricting disclosure of all information should be made unacceptable. Consideration is given to the existing legal framework and the specific elements of law that should be utilised in order to find the right balance between competing rights, although the corporate responsibility is not considered in any great detail, but it is further acknowledged that economics and market mechanisms have a large role to play.

Chapter 2 provides the reader with important background information about the history and resources of Uganda followed by a consideration of their human rights record. This chapter goes on to evaluate the emerging oil sector, including the

companies operating there and the current legislative reform proposed and taking place. Before finishing, some issues and Uganda's legal stance on the environment is also briefly considered.

Chapter 3 attempts to use case studies to demonstrate the severity of the potential human rights impact of similar operations. Due to time constraints each scenario can only be considered in summary but the chapter begins with a look at possibly the most extreme example of the dangers faced by oil extraction operations in Nigeria. The reported corruption and mismanagement of a centrally controlled revenue stream, not reliant on domestic taxation that comes as a result of the lack of transparency in Angola will be reviewed. This is followed by discussion of the situation in Burma where it was hoped to highlight the fact that courts are becoming increasingly willing to exercise extra-territorial jurisdiction for complicity in human right violations against companies operating there. Even if they are not directly involved they should be aware that by simply transacting with the host governments can activate accountability as they may be financing, sometimes solely, the regime responsible. Lastly it will be shown the importance of exercising due diligence over security forces by looking at Indonesia and sub-contractors in the Côte d'Ivoire.

Chapter 4 beings the main body of the papers legal evaluation by looking at the human right of Access to Information. It starts by establishing the basis in international law contained within the Universal Declaration of Human Right (herein after the 'UDHR'), the International Covenant on Civil and Political Right (herein after the 'ICCPR') and African Charter on Human and Peoples' Rights (herein after the 'African Charter') as well as other international and regional instruments and

initiatives. It will then review to a variety of relevant domestic law and policy including the Constitution of the Republic of Uganda, 1995 (herein after the 'Constitution'). Before summarising this chapter will also consider the linkages the right of Access to Information has with *every* other human right.

Chapter 5 will continue to establish the legal basis of claims made by looking at the competing human rights of Privacy and Property and considers if, and to what extent, these right may be applicable to non-human entities such as business. It will follow the same format as the previous chapter by reviewing international and regional human rights law, this time also looking at the relevant provisions contained within the European Convention on Human Rights (herein after the 'ECHR') and the American Convention on Human Rights (herein after the 'American Convention'), and then proceed to look again at relevant domestic legislation. This chapter will also consider any possible justification the State may have to insist on secrecy with regards to the PSAs it makes.

Chapter 6 acts as a kind of comparative study by reviewing how these principles have been dealt with by the courts when they come into conflict, beginning with Uganda but then looking at some jurisprudence from Europe, Australia and the United States. These jurisdictions were specifically selected prior to looking at the case law simply because they appeared to be the most advanced in this area of law. Finally, before concluding, this author will attempt a personal analysis in Chapter 7 firstly by identifying the main issues arising from the preceding chapters, applying the specific known facts to these issues and attempting an evaluation.

2. Background Information

Uganda is a land-locked country in east-central Africa that borders Sudan, Kenya, the Democratic Republic of Congo, Rwanda and Tanzania. It was granted internal self-governance from Britain in 1961 and gained full independence in 1962. World Bank data says that the 2011 population was estimated at just over 34.5 million.¹ The 1995 Constitution established Uganda as a Republic with executive, legislative and judicial branches. It establishes, *inter alia*, that the President is to be elected at least every five years.² On the 18th February 2011, Uganda held its fourth presidential and parliamentary elections since the current President, Yoweri Kaguta Museveni, took control in 1986; he was declared the winner with 68% of the votes.³

Uganda is said to be a resource rich country, exporting copper, cobalt, coffee, tea, cotton, limestone, salt and gold.⁴ It also has hydropower and arable land with tropical rainfall.⁵ However, the UN still lists it as one of the forty-eight Least Developed Countries, although this is expected to change if and when it starts to produce oil, but for now this means that it “represents the poorest and weakest segment of the international community.”⁶ In fact it was the first country to be eligible for the IMF

¹ <http://data.worldbank.org/country/uganda> accessed on 09/01/13

² Article 105(1)

³ Unknown author, ‘Uganda election: Yoweri Museveni wins fresh term’, BBC, 20 February 2011, available [online] at: <http://www.bbc.co.uk/news/world-africa-12516562>

⁴ http://www.economywatch.com/world_economy/uganda/export-import.html accessed 01/08/12

⁵ <http://www.state.gov/r/pa/ei/bgn/2963.htm> accessed 01/08/12

⁶ <http://www.unohrrls.org/en/ldc/25/> accessed on 01/08/12

Heavily Indebted Poor Countries initiative and so had virtually all of its foreign debt forgiven by the IMF, World Bank and other major donors.⁷

2.1 Human Rights

Throughout its history Uganda has suffered massive human rights violations, for example, in 1978 the International Commission of Jurists estimated that more than 100,000 Ugandans had been murdered during commander Idi Amin's eight-year rule through state-sponsored violence;⁸ the BBC claim that this figure was up to half a million.⁹ It has been noted though that there have been improvements with the human rights situation since President Museveni has come to power, most notably with the reduction of abuse by the army and police forces.¹⁰

Uganda is currently party to all major core human right treaties¹¹ including the International Covenant on Economic, Social and Cultural Rights (ICESCR), the ICCPR and the first Optional Protocol,¹² the Statute on the Establishment of the International Criminal Court, the Treaty Establishing the East African Community, the African Charter and the 1998 Protocol on the Establishment of an African Court on Human and Peoples' Rights. However, it should be noted that their reporting to the relevant committees or corresponding bodies has been highly inconsistent.

⁷ <http://www.imf.org/external/np/exr/facts/hipc.htm> accessed on 02/08/12

⁸ *Supra* note 5

⁹ <http://www.bbc.co.uk/news/world-africa-14107906> accessed on 01/08/12

¹⁰ *Ibid.*

¹¹ see Human Rights Council Working Group on the Universal Periodic Review for Uganda, 22 July 2011, UN Doc. A/HRC/WG.6/12/UGA/1, paragraphs 26 - 27

¹² Albeit with a reservation regarding the competence of the Human Rights Committee, available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en accessed on 01/08/12

2.2 The Emerging Oil Sector

Oil was discovered in Uganda in 1938 however due to World War II¹³ and a lack of political desire that followed, oil has not been extracted from the country thus far. It appears that this is about to change though and the most recent estimates predict that the reserves hold 3.5 billion barrels of extractable oil;¹⁴ a 40% increase on previous estimates.

The Ugandan government had identified five exploration sectors: Albertine Graben, Lake Kyoga basin, Hoima basin, Lake Wamala basin and the Moroto-Kadam basin.¹⁵ The most prospective was thought to be the Albertine Graben, around Lake Albert, which was subsequently sub-divided into seven exploration areas.¹⁶ Five of the seven were licensed to the following: Block 1 to Heritage Oil plc and East Africa Ltd, Block 2 to Hardman Resources Ltd and Energy Africa Ltd, Block 3A to Heritage Oil plc and later Heritage Oil plc and Tullow Oil plc, block 4B to Dominion Uganda Ltd and Block 5 to Neptune Petroleum (Uganda) Ltd; the remaining two were left open.

Currently Exploitation licences are owned by three companies; Tullow Oil plc, CNOOC Limited and Total (Exploration and Production), with operations due to commence in 2017.¹⁷

¹³ http://www.ugandaoilandgas.com/ugandaoilandgas_003.htm accessed on 02/08/12

¹⁴ Biryabarema, E., 'Uganda ups oil reserves estimate 40 pct to 3.5 bln bbls', Reuters, 17 September 2012, available [online] at: <http://www.reuters.com/article/2012/09/17/uganda-oil-idUSL5E8KH1MG20120917>

¹⁵ *Supra* note 13

¹⁶ *Ibid.*

¹⁷ [Ssekika, E., 'Total lifts lid on its oil plans in Uganda', The Observer, 3 October 2012, available \[online\] at: http://www.observer.ug/index.php?option=com_content&task=view&id=21323&Itemid=114](http://www.observer.ug/index.php?option=com_content&task=view&id=21323&Itemid=114)

Tullow Oil plc (herein after ‘Tullow’) was founded in Ireland in 1985 by its current CEO, Aidan Heavey who acknowledges that he had no experience in the industry and states that a friend, working in the World Bank, advised him about a potentially lucrative project in Senegal.¹⁸ By 1987 Tullow had listed itself on the London and Irish Stock Exchanges and experienced steady expansion into eight countries during the 1990s. In 2000, the year it re-registered in the UK, it completed a £201 million acquisition of producing gas fields and related infrastructure in Britain from BP. In 2004 Tullow’s success continued when the Group doubled in size by the acquisition of Energy Africa. The company grew substantially again in 2007 when Tullow completed a US \$1.1 billion acquisition of Hardman Resources Ltd. By 2010, just twenty-five years after their first recorded sales, the company were operating in twenty-two countries and post revenue of \$2.3 billion.¹⁹ The company has had interests in Uganda since 2004²⁰ it held three licences for blocks 1, 2 and 3A, which were gained by the acquisitions of Energy Africa and Hardman Resources. Also, in early 2010 Heritage sold their interests in Uganda to Tullow, which was eventually approved when Tullow covered the cost of an outstanding tax dispute; they are subsequently suing Heritage for recovery of these funds.²¹ However in February 2012 Tullow uncharacteristically decided to “farm down” by two-thirds of their acreage to CNOOC limited and Total for \$2.9 billion.²² Immediately prior to that, there was a hold up in the production agreement between Tullow and Uganda; reportedly

¹⁸ <http://www.tulloil.com/index.asp?pageid=13> accessed on 02/08/12

¹⁹ *Ibid.*

²⁰ Tullow Oil plc, Corporate Responsibility Report 2011/12, p35

²¹ Blair, D., ‘Tullow sues Heritage over Uganda tax bill’, Financial Times, 18 April 2011, available [online] at: <http://www.ft.com/intl/cms/s/0/f31010e0-69f1-11e0-89db-00144feab49a.html#axzz22NaGbo00>

²² <http://www.tulloil.com/index.asp?pageid=137&newsid=737> accessed on 02/08/12

regarding renegotiation of a stabilisation clause for future tax rates²³ however, the Minister of Energy and Mineral Development wrote to Tullow and Heritage to say that the government would not support the sale of the shares, presumably as it would create an effective monopoly in the sector.²⁴ So it would seem that for Tullow to operate the Ugandan government stipulated two non-negotiable conditions; that they do not have a monopoly over the market, and that someone covers the capital gains tax owed to the government from Heritage's resale of their exploitation licence. The Group's website claims that "Tullow has detailed policies, procedures and systems in place to support risk management across the Group. These include Code of Business Conduct, HR [Human Right] and EHS [Environmental Health and Safety] policies and systems, supply chain management [and] crisis management plans".²⁵

CNOOC Uganda Limited (herein after 'CNOOC') is a wholly owned subsidiary of CNOOC International, which is an investment holding company of CNOOC Limited,²⁶ a Chinese state-owned company. The parent company is listed on the Hong Kong Stock Exchange and has American Depositary Shares listed on the New York Stock Exchange. It is the largest producer of offshore crude oil and natural gas in the world. The company engages in exploration, development, production and marketing of oil and gas.²⁷ Like Tullow, CNOOC also have created and published a Social Responsibility policy.²⁸

²³ Unknown author, 'Uganda and Tullow sign deal to start oil production', BBC, 3 February 2012, available [online] at: <http://www.bbc.co.uk/news/world-africa-16872987>

²⁴ Bergin Reuters, T., 'Tullow Oil sells stakes in Uganda to Total and CNOOC for \$2.9bn', The Guardian, 30 March 2011, available [online] at: <http://www.guardian.co.uk/business/2011/mar/30/tullow-oil-sells-stakes-in-uganda>

²⁵ <http://www.tulloil.com/index.asp?pageid=45&sharepanel=share> accessed on 31/07/12

²⁶ <http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=83479068> accessed on 02/08/12

²⁷ <http://www.cnoccltd.com/encnocltd/aboutus/default.shtml> accessed 02/08/12

²⁸ <http://www.cnoccltd.com/encnocltd/shzr/default.shtml> accessed on 02/08/12

Total (Exploration and Production) Uganda (herein after ‘Total’) is a subsidiary of Total S.A; a French company listed on the Paris Stock Exchange, which also has ADS listed on the New York Stock Exchange. Like the other two companies that have been granted extraction licences in Uganda, Total has a Social Responsibility policy, but also an Ethics Charter and Codes of Conduct.²⁹

Further exploration licences are close to being granted for other exploration sectors, presumably the government are waiting for the legislative reform (discussed below) to take effect.³⁰ It has been reported that there is “a long line of investors waiting to bid for oil exploration licences”, including Ugandan companies³¹ however this time the government plans to award based on competitive bidding rather than a ‘first-come, first-serve’ bases;³² whether this process will be publically disclosed remains unclear.

It would appear then that the Ugandan government is happy to delay both the issuing of new exploration licences and, approval for extraction until they feel that the conditions are beneficial to them.³³ A further disagreement between the government and oil companies arose when it became apparent that the government, instead of allowing the companies to build a pipeline and export crude oil, they wished to refine

²⁹ <http://www.total.com/en/our-challenges/ethique-201068.html> accessed on 13/01/13

³⁰ *Supra* note 17

³¹ Ssekika, E., ‘Ugandan firms to bid for oil licences’, *The Observer*, 25 November 2012, available [online] at:

http://www.observer.ug/index.php?option=com_content&view=article&id=22261%3Augandan-firms-to-bid-for-oil-licences&Itemid=96

³² Biryabarema, E., ‘Uganda plans competitive bidding for mining licences’, *Reuters*, 1 October 2012, available [online] at: <http://www.reuters.com/article/2012/10/01/uganda-mining-idUSL6E8L1H1B20121001>

³³ Bariyo, N., & Amiel, G., ‘Effort to Start Pumping Ugandan Oil Stalls’, *The Wall Street Journal*, 4 September 2012, available [online] at:

<http://online.wsj.com/article/SB10000872396390444301704577631332338109986.html>

the oil themselves.³⁴ The government says that it wants a 40% stake in planned refinery and so offers investors initially 60%; they would then offer the East African Community a 10% stake at a later stage to cement their partnership. The cost of this proposed refinery is said to be between \$2 and \$5 billion depending on capacity, which is another source of disagreement. The government says it wants to refine 120,000 barrels per day, whereas Tullow says its optimal performance should be 60,000. Of course it would be more profitable to the companies to export crude oil to their own refineries but officially they say Uganda should not refine more than it uses domestically as it will not find a buyer on the open market. So the debate carries on; on one side the oil companies hope to export most of the crude oil believing that the regional demand will be insufficient³⁵ and Tullow have already acquired the land for a pipeline in Kenya.³⁶ On the other side, Uganda is seeking an advisor to help secure financing³⁷ and is negotiating with Kenya and South Sudan over a joint oil infrastructure plan to coordinate the construction of oil refineries and oil pipeline.³⁸

³⁴ Biryabarema, E., 'Uganda eyes 40 pct stake in planned refinery', Reuters, 20 July 2012, available [online] at: <http://www.reuters.com/article/2012/07/20/uganda-oil-idUSL6E8IK55Y20120720>

³⁵ Mbanga, J., 'Uganda's crude oil to be exported', The Observer, 26 July 2012, available [online] at: http://www.observer.ug/index.php?option=com_content&view=article&id=20047:-ugandas-crude-oil-to-be-exported&catid=79:businessstopstories&Itemid=68

³⁶ Kavanagh, M., 'Tullow extols Kenya pipeline plan', Financial Times, 25 July 2012, available [online] at: <http://www.ft.com/intl/cms/s/0/4cddfd4a-d679-11e1-ba60-00144feabdc0.html#axzz2HX5kFI9P>

³⁷ Biryabarema, E., 'Uganda energy ministry searching for oil refinery advisor', Reuters, 7 September 2012, available [online] at: <http://www.reuters.com/article/2012/09/07/uganda-oil-idAFL6E8K7J5Z20120907>

³⁸ Unknown author, 'AfDB to support East African's oil infrastructure scheme', The Guardian, 17 August 2012, available [online] at: http://www.ngrguardiannews.com/index.php?option=com_content&view=article&id=95826:afdb-to-support-east-africans-oil-infrastructure-scheme&catid=31:business&Itemid=562

2.3 Legislative Reform

The main piece of legislation currently governing the oil sector is the Petroleum (Exploration and Production) Act 1985. This Act regulates the exploration and production of petroleum and the issue of licences. In light of recent events though, the government have introduced two bills to parliament: the Petroleum (Exploration, Development and Production) Bill 2012 (herein after referred to as ‘Bill 1’) and, the Petroleum (Refining, Gas Processing and Conversion Transportation and Storage) Bill 2012 (herein after referred to as ‘Bill 2’). Bill 1 was enacted into legislation days before the time of writing this paragraph with the second due for discussing in Parliament the following week.³⁹

A recent Global Witness Report commented that, although there are a number of positive aspects with regard to the proposed legislation there were also “still big gaps” that should be addressed.⁴⁰ One point in particular that is continually emphasised by Global Witness is the lack of parliamentary involvement as neither Bill allows for oversight. For example, Bill 1 *allows* for a process of competitive bidding for access to the sector,⁴¹ but it does not require it, so the possibility of corrupt practice remains. In addition, there is no specific pre-requirement of competing companies in terms of past practice or Corporate Social Responsibility policies; much of the decision-making is left to ministerial discretion. There is a process for public objection to opening of new areas however this does not apply to renewal of licences, so parliamentary oversight or public participation is not applicable for the licences

³⁹ Kron, J., ‘Uganda: Oil Industry Regulations Passed’, The New York Times, 7 December 2012, available [online] at: http://www.nytimes.com/2012/12/08/world/africa/uganda-oil-industry-regulations-passed.html?_r=2&

⁴⁰ Global Witness, “Uganda’s petroleum legislation: Safeguarding the sector”, 28 February 2012, p1

⁴¹ Section 57

already granted in the Albertine Graben as these extraction agreements had been finalised prior to the enactment of these proposed Bills. A more positive aspect is that licensees' are required to hire, train and provide financial support for the education of Ugandans.⁴² Tullow claim to have one hundred and seventy-five employees working in Uganda and nine community liaison officers; eighty-four per cent of the workers are said to be part of the local community.⁴³ The two Bills do not cover a key feature of massive importance to the emerging oil sector; financial management, however it is thought that a third Petroleum Finance Bill will be brought for consideration and approval shortly. Global Witness rightly points out that logically these three should be considered and approved together.⁴⁴

2.4 Environmental Issues

It has been said that the Albertine Rift is the most bio-diverse region of Uganda and one of the most species-rich areas of the world.⁴⁵ Exploration for oil in the Murchison National park on the northern tip of Lake Albert has been scheduled for September this year. Lake Albert is located in the northwest of Uganda and acknowledge by Tullow as one of Africa's most important sites for the conservation of biodiversity;⁴⁶ this is the country's largest conservation area and is home to many species including elephants, leopards, lions, giraffes, buffaloes, antelopes, hippos and

⁴² Bill 1, Sections' 123 and 124. Bill 2, Sections 55 and 56.

⁴³ *Supra* note 20, p36

⁴⁴ *Supra* note 40

⁴⁵ International Alert, "Oil and Gas Laws in Uganda: A legislator's Guide – Oil Discussion Paper No. 1", May 2011, p37

⁴⁶ <http://www.tulloil.com/index.asp?pageid=62> accessed on 31/07/12

crocodiles.⁴⁷ Tullow claim that in “recognition of the rich environmental, economic and social value of Lake Albert, Tullow is conducting a two-year programme to assess the key impacts of its activities in the area. The Group is also undertaking a wide range of ‘Working with Communities’ initiatives”.⁴⁸

As well as for biodiversity, there are concerns for the ecosystems too; although apparently Environmental Impact Assessments (EIAs) have been completed, they will not be made publically available. Some of the environmental issues that Ugandans currently face include the draining of wetlands to support agriculture, deforestation, overgrazing, soil erosion, water hyacinth infestation in Lake Victoria and widespread poaching.⁴⁹ However, further environmental concerns raised include that no solution has been found to handle toxic waste, which will inevitably contaminate and pollute the land and water.⁵⁰

Among others, Uganda is a party to the Vienna Convention for the Protection of the Ozone Layer, the United Nations Framework Convention on Climate Change and the African Convention on the Conservation of Nature and Natural Resources.

⁴⁷ <http://www.ugandawildlife.org/explore-our-parks/parks-by-name-a-z/murchison-falls-national-park/wildlife-and-birding-summary> accessed on 02/08/12

⁴⁸ *Supra* note 46

⁴⁹ <https://www.cia.gov/library/publications/the-world-factbook/geos/ug.html> accessed on 01/08/12

⁵⁰ http://www.arrforum.org/index.php?option=com_content&view=article&id=116&Itemid=154 accessed 02/08/12

3. Human Rights Impact

It has been said that, “when a TNC [trans-national corporation] exploits a host country’s natural resources and harms its land, developing countries often fail to enforce ... laws because they fear the company will leave and take its jobs and dollars with it. Today, developing countries are asked to trade health and safety for the progress and prosperity promised by economic venture of TNCs. Presently, without any binding international law to protect host countries, individual nations find themselves in a difficult situation.”⁵¹ Some situations where this may have happened, which the people of Uganda should be aware of, will now be considered.

3.1 Nigeria

This section will briefly consider the impact of oil exploitation that has been happening in the Niger Delta, home to around 31 million people,⁵² since 1956; perhaps the most prevalent example of the potential dangers faced to local communities from this process. A study was carried out by international environmental experts in 2006 that claimed that, the Niger Delta is “one of the most

⁵¹ Schmidt. T.M., “Transnational Corporate Responsibility for International Environmental and Human Rights Violations: Will the United Nations’ Norms Provide the Required Means?”, (2005) 36 California Western International Law Journal 217 at 218

⁵² Amnesty International, “Nigeria: Petroleum, Pollution and Poverty in the Niger Delta”, June 2009, p9

oil-impacted ecosystems in the world.”⁵³ The revenue generated by this is thought to be around \$600 billion since the 1960s however, in spite of this the majority of the population still lives in poverty.⁵⁴

The largest oil company operating in the region, via a complex web of subsidiaries, is the Shell Petroleum Development Company (SPDC). Although they have a distinct operating licence SPDC are also working in consortium with the Nigerian government and are accused of causing dangerously harmful environmental impacts as a consequence of numerous spills of crude oil which resulted in the contamination of surrounding land and rivers.⁵⁵ This has been said to cause a variety of short and long-term health issues for the local population as well as causing negative impacts on the food and water supply therefore, the livelihoods of the citizens.⁵⁶ The situation came before the African Commission on Human and Peoples’ Rights which, for the first time were asked to deal with substantive allegations of economic, social and cultural rights; it concluded in 2001.⁵⁷ The case was lodged by two NGO’s on behalf of the Ogoni people and violations were found of Articles 2 (equality and non-discrimination), 4 (right to life), 14 (right to property), 16 (right to health), 18(1) (right to family), 21 (right to freely dispose of wealth and natural resources) and 24 (right to a satisfactory environment) of the African Charter. Even rights that were not explicitly provided for by the Charter were found as combinations of other rights were

⁵³ Nigerian Conservation Foundation WWF UK and International Union for Conservation of Nature, Commission on Environmental, Economic and Social Policy with Federal Ministry of Environment (Abuja), “Niger Delta Natural Resources Damage Assessment and Restoration Project Scoping Report”, May 2006

⁵⁴ <http://data.worldbank.org/indicator/SI.POV.DDAY/countries/NG?display=graph> accessed 02/01/13

⁵⁵ Sekularac, I., and Deursch, A., ‘Shell faces Dutch lawsuit over Niger Delta pollution’, Reuters, 10 October 2012, available[online] at <http://www.reuters.com/article/2012/10/10/us-shell-nigeria-lawsuit-idUSBRE8991SE20121010>

⁵⁶ Communication 155/96, The Social and Economic Rights Action Center and the Center for Economic, and Social Rights / Nigeria

⁵⁷ *Ibid.*

read into other rights; the right to housing was violated as a combination of property, health and family rights and, the right to food was found to be violated as the right to life, health and economic, social and cultural development collectively were held to incorporate the right to food.

The government was asked to conduct investigations into human rights violations and prosecute officials from both the national security forces and consortium company that were found to be committing attacks on the Ogoni people, compensate the victims and clean up the land and rivers.⁵⁸ Significantly, because the government had kept the Ogoni communities uninformed about the damages created by the oil companies, and because it failed to produce basic health and environmental impact studies,⁵⁹ they should also take measures to ensure that the appropriate impact assessments are made and, that the potentially affected populations should be properly informed about the risks.⁶⁰

It has been suggested that the spills in the Delta were as a result of the alleged failure to adhere to legislation requiring the company to maintain equipment, designed in order to prevent pollution.⁶¹ Shell has declared that this is commonly as a result of third-party sabotage for the purposes of theft and illegal refining.⁶² Even if this were accurate Shell's level of maintenance may be a contributory cause of damage but

⁵⁸ Coomans, F., "The Ogoni Case before the African Commission and Human and Peoples' Rights", *International and Comparative Law Quarterly*, Volume 52, July 2003 at p757

⁵⁹ *Ibid.*, p754

⁶⁰ *Ibid.*, p755

⁶¹ The Petroleum (Drilling and Production) Regulations of 1969, Article 25 contained in the Petroleum Act 1969

⁶² Salau, S., 'Shell records 15,408 barrels of oil spill in 2011', *The Guardian*, 19 September 2012, available [online] at: http://www.ngrguardiannews.com/index.php?option=com_content&view=article&id=99108:shell-records-15408-barrels-of-oil-spill-in-2011&catid=94:energy-report&Itemid=592

regardless of liability, there is an obligation on the company to act quickly in the event of an oil spill irrespective of whether the source is known or whether it was believed to be damage resulting from malicious third parties.⁶³ Furthermore, international standards are clear that where there is a high-risk of third-party interference (such as in the Delta), operators must adopt extra measures to protect the integrity of a pipeline and the Nigerian government regulations also require swift clean up of oil spills, which are frequently reported as not taking place.⁶⁴ Methods of protection could include the use of sabotage resistant pipe specifications, alternative routing, enhanced leak detection systems and increased surveillance. As a result, even if Shell could legitimately claim that spills were a result of third-party sabotage, there are still under an international obligation to stop any leaks as soon as possible and clean up promptly to minimise the damage.⁶⁵ It would seem that the Ugandan government may have pre-empted this issue as they have included provisions in both the proposed oil Bills to attribute liability for pollution damage to the licensee, without regard to fault.⁶⁶

Another destructive element of the activities in the Delta is the process of gas flaring, which is the burning of excess gas as a by product from crude oil and although often economically advantageous it is a wasteful exercise as the gas being destroyed could be used as an alternative energy. Gas flaring is said to pollute the air contributing to climate change, results in acid rain and may cause respiratory diseases, skin infection and increases the risk of cancer.⁶⁷ A case came before the Nigerian

⁶³ *Supra* note 61

⁶⁴ *Supra* note 52

⁶⁵ Environmental Guidelines and Standards for the Petroleum Industry in Nigeria

⁶⁶ Bill 1, Section 127(1), Bill 2, Section 60(1)

⁶⁷ *Gbemre v Shell Petroleum Development Company Nigeria Limited and Others* (2005) AHRLR 151 (NgHC 2005)

Federal High Court in 2005 which centred on the effects of gas flaring.⁶⁸ In this case the court established that the constitutionally guaranteed rights included the right to a clean, poison-free, pollution-free healthy environment and so, violations of Sections 33(1) and 34(1) of the Constitution of the Federal Republic of Nigeria were found. The Court said that gas flaring was a gross violation of the right to life (in a healthy environment) and of dignity of human person, all of which are contained similarly in the Ugandan Constitution at Articles 22 (39) and 24 respectively. Even if they were not, the Nigerian Court recognised alternatives in African Charter at Articles 4, 16 and 24. Consequently an order was made to immediate stop gas flaring in the applicant's community. It was reported in 2010 that the Ugandan government issued licences to flare gas,⁶⁹ albeit with consent, within agreed limitations and with a statutory fine for unauthorised breaches.⁷⁰

The situation in Nigeria has given rise to other courts applying jurisdiction extra-territorially. In the Netherlands a Dutch court accepted jurisdiction of three separate lawsuits brought against Shell on behalf of Oruma, Goi and Ado Udo villages of Nigeria in 2009.⁷¹ The jurisdictional basis of the claim is that the Netherlands is the home state, or, where Shell is registered; the case is on-going. Even though SPDC is a subsidiary with a separate legal identity it has been argued that a parent company has a duty of care which extends to implementation and supervision of certain standards. Additionally, in 2011 proceedings in the UK were commenced against Shell on behalf of the 69,000-strong Bodo community from the Delta. In this case

⁶⁸ *Ibid.*

⁶⁹ Macalister, T., 'Tullow Oil given licence to flare Ugandan gas', *The Guardian*, 16 February 2010, available [online] at: <http://www.guardian.co.uk/business/2010/feb/16/tullow-oil-uganda-agreement>

⁷⁰ Bill 2, Section 39

⁷¹ <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/ShelllawsuitreoilpollutioninNigeria> accessed on 02/01/13

Shell has admitted liability for the spills and acceded to the jurisdiction of the UK courts in July 2012.⁷² The jurisdictional basis for the claim is that the UK is where Shell has their main headquarters. Settlement for the UK claim was speculated around £250 million by the Financial Times.⁷³ Finally, in 1996 lawyers in the US brought a number of cases against Shell to hold them accountable for their involvement in the human rights violations in Ogoniland.⁷⁴ However in 2009 Shell and the plaintiffs reached a reported settlement of US\$15.5m, with the company admitting no liability.⁷⁵ In addition, the US Supreme Court reheard oral arguments in the case of *Kiobel v Royal Dutch Petroleum Co.*⁷⁶ on the 1st October 2012. This ongoing case was filed by Ester Kiobel on behalf victims of violence following protest, including her husband who was executed. The claim is based upon a law from 1789 known as the Alien Tort Statute.

As mentioned, this is an extreme example of the dangers of the so-called resource curse. The lack of information, or at least accessible information, and consultation has allowed the situation to carry on so long; the litigation has been going on for decades, since the 90s, but still continues.

⁷² Naagbantou, P., 'Shell has admitted liability but has a long way to go to make amends', The Guardian, 4 August 2011, available [online] at:

<http://www.guardian.co.uk/commentisfree/2011/aug/04/shell-nigeria-oil-spills> accessed on

⁷³ Pfeifer, S. & Croft, J., 'Shell's Nigeria pay-out could top £250m', Financial Times, 3 August 2011, available [online] at: <http://www.ft.com/intl/cms/s/0/4209f536-bde8-11e0-ab9f-00144feabdc0.html#axzz23Vg1iRzK> accessed on 02/01/13

⁷⁴ <http://wiwavshell.org/about/about-wiwa-v-shell/> accessed on 02/01/13

⁷⁵ *Supra* note 52, p4

⁷⁶ 621 F.3d 111 (2d Cir 2010)

3.2 Angola

It has been claimed that in Angola, there has historically been immense corruption and mismanagement of the countries substantial oil revenues, with no accountability.⁷⁷ Some reform steps have been taken, such as publication of oil revenues, a financial management system to track government expenditure and an audit of the powerful state-owned oil company however it has been alleged that corruption still remains prevalent.⁷⁸ Transparency International has listed Angola as 157th out of 176 in their 2012 Corruption Perceptions Index;⁷⁹ the higher the countries position is the more corrupt they are deemed to be by the calculations of this organisation. Uganda is listed as 130th on the same index.⁸⁰ It is claimed that the problems arise from and remain with a centrally controlled revenue stream, which is not reliant on domestic taxation allowing for the possibility of political and personal self-enrichment.⁸¹ The proposed solutions include international pressure, particularly from the IMF and its key member governments; specifically that they should insist on audited expenditure accounts as a pre-condition for any new Stand-By Arrangement⁸² and adherence to the Extractive Industries Transparency Initiative (EITI).⁸³ One of the most controversial aspects of the recently accepted Petroleum Bill in Uganda is Clause 9, which allows the Minister responsible for petroleum activities very broad discretionary powers with regard to the granting and revoking of licences, negotiating

⁷⁷ Human Rights Watch, "Transparency and Accountability in Angola: An Update", April 2010

⁷⁸ *Ibid.* p2

⁷⁹ <http://www.transparency.org/country#AGO> accessed on 02/01/13

⁸⁰ *Ibid.*

⁸¹ *Supra* note 77, p3

⁸² for details see IMF website at <http://www.imf.org/external/np/exr/facts/sba.htm> accessed on 17/08/12

⁸³ *Supra* note 77, pp 20- 22

agreement, approving development plans and implementing policy, without review or approval from Parliament.

3.3. Burma

EarthRights International has been highlighting some of the problems that have arisen in Burma from the Yadana Pipeline Project since the mid-90s,⁸⁴ with a particular focus on Total (E&P) Myanmar. In their most recent report⁸⁵ EarthRights International claimed that the companies operating there (which include CNOOC) bear responsibility for the human rights violations that reportedly take place including extrajudicial killings, forced labour and uncompensated land confiscations, as they are knowingly financing the military regime responsible. As with the situation in Angola, the government is heavily reliant on this single source of revenue. The Report even goes as far as suggesting that these violations amount to war crimes and crimes against humanity as defined by the Rome Statute,⁸⁶ a claim which has been supported by the UN Special Rapporteur,⁸⁷ and that the financing also supports an illegal nuclear weapons programme.⁸⁸ When the firms were asked to publish details of their payments to the corrupt military regime they responded by claiming that *they* were contractually bound to secrecy, suggested that the Burmese government may be

⁸⁴ EarthRights International, "Total Denial: A Report on the Yadana Pipeline Project in Burma", July 1996

⁸⁵ EarthRights International, "Energy Insecurity: How Total, Chevron, and PTTEP Contribute to Human Rights Violations, Financial Secrecy, and Nuclear Proliferation in Burma (Myanmar)", July 2010

⁸⁶ *Ibid.*, p15

⁸⁷ Progress report of the Special Rapporteur on the situation of human rights in Myanmar, Tomás Ojea Quintana, UN Doc. A/HRC/19/67, 7 March 2012, paragraph 121

⁸⁸ *Supra* note 85, pp 15 - 19

opposed to the idea; Total also apparently claimed that secrecy allows for a competitive advantage.⁸⁹

Finally, it has unsurprisingly been claimed that this long-term regime has not allowed sufficient access to justice for those negatively affected by the Pipeline project. However, the US Courts were willing to exercise jurisdiction under the aforementioned Alien Tort Statute for corporate complicity over the matter in *Doe v Unocal*,⁹⁰ which is now a Chevron subsidiary. Although launched in 1996, an out of court settlement was only reached in 2005.⁹¹ Another claim was accepted in France for this and it was reportedly settled when Total agreed to compensate €5.2 million for complicity with forced labour in Burma.⁹²

3.4 Indonesia

Another case of relevance for the focus of this paper from the United States Court of Appeals is *John Doe VIII et al. v Exxon Mobil Corporation et al.*⁹³ Although the appeal was based on jurisdiction and not merits it was claimed that Exxon and several of its wholly-owned subsidiaries, who operate a large natural gas extraction and processing facility in the Aceh province of Indonesia, used their security forces to commit murder, torture, sexual assault, battery and false imprisonment.⁹⁴ Furthermore, it was claimed that Exxon retained these guards, who were comprised of

⁸⁹ *Ibid.*, p16

⁹⁰ 248 F.3d 915 (9th Cir. 2001)

⁹¹ <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/UnocallawsuitreBurma> accessed on 20/08/12

⁹² Unknown author, 'Total settles rights case', The New York Times, 29 November 2005, available [online] at: <http://www.nytimes.com/2005/11/29/business/worldbusiness/29iht-total.html>

⁹³ 473 F.3d 345 (D.C. Cir. 2007)

⁹⁴ *Ibid.*, p3

Indonesian military,⁹⁵ with the knowledge that they had committed human rights abuses in the past⁹⁶ and provided them with logistical and material support.⁹⁷

The Court held that companies were not immune to claims under the Alien Tort Statute. The relevance being that this is a practical example that courts are willing to hold corporations liable for human right violations even where jurisdiction is applied extra-territorially; presumably the companies operating in Uganda will also have some sort of security detail and so they too should be aware of their obligations to exercise due diligence.

3.5 Côte D'Ivoire

Finally worth mentioning is a case which was initiated in the UK in 2006 and settled in 2009 by 29,614 Ivorian residents affected by the dumping of toxic waste. There was an appeal regarding the cost of the legal fees involved, which conveniently sets out the facts of the scenario.⁹⁸ The defendants, Trafigura Ltd, apparently were unsuccessful in finding a business that was willing to dispose the toxic waste from their operations in Amsterdam, Paldiski, Estonia, at Lomé, Togo and at Lagos, Nigeria,⁹⁹ primarily because the process is dangerous and often illegal. Eventually they agreed to pay a local company in Abidjan to get rid of it; 528 tonnes of chemical waste.¹⁰⁰ The waste was illegally tipped and resulted in 100,000 residents attending local hospitals complaining of skin, eye, throat and breathing problems.

⁹⁵ *Ibid.*, p4

⁹⁶ *Ibid.*, p5

⁹⁷ *Ibid.*, p6

⁹⁸ *Motto et al. v Trafigura* [2011] EWCA Civ 1150

⁹⁹ *Ibid.*, paragraph 7

¹⁰⁰ *Ibid.*, paragraph 9

The defendants, whilst not accepting liability, agreed to pay US\$200 million to the Côte d'Ivoire government¹⁰¹ and £30 million to the claimants.¹⁰² Given the nature of the operations, the companies (and indeed the government if they proceed with the proposed oil refinery) in Uganda should be aware that it is not just the procedures themselves but the by-products and disposal thereof which could give rise to legitimate claims under human rights law.

3.6 Summary

The purpose of this chapter was to highlight the potential human rights impacts of mismanaged operations within the oil and gas sectors. Hopefully it has been shown that these can affect the following rights; life, health, food, water, housing, environment, property, family, free disposal of wealth and natural resources, housing, non-discrimination, forced labour, torture, sexual assault, battery, false imprisonment, access to justice and even War Crimes and Crimes Against Humanity. In addition to alerting the host and home States to their responsibilities under international human rights law, it was this authors intention to touch of the responsibilities that the operating companies have and should be aware of such as to exercise due diligence over the likes of their security forces and sub-contractors. Furthermore it appears that home States (or other States with where it is felt there is sufficient proximity to the operating company) are becoming more willing to exercise jurisdiction extra-territorially; business should also be aware of this.

¹⁰¹ *Ibid.*, paragraph 15

¹⁰² *Ibid.*, paragraph 22

4. Access to Information

During the very first regular session of the UN General Assembly in 1946, it adopted Resolution 59(I), which states “Freedom of information is a fundamental human right”. It is often linked with and included in the freedoms of opinion and expression, which are said to be the cornerstone of democracy. This seems a fair statement as one cannot express a sensible opinion as intended by Article 19 of the ICCPR without the relevant information. Furthermore it is logical that the relevant information is essential for the public participation mentioned in Article 25 of the ICCPR. The UN Special Rapporteur on Freedom of Opinion and Expression shared this belief by claiming in his 1995 Report to the UN Commission on Human Rights that “Access to information is basic to the democratic way of life.”¹⁰³

In 2006 it was stated that over 60 countries have ‘Access to Information’ legislation, with a further 40 proposed.¹⁰⁴ In principle, the information held by public authorities is not acquired for the benefit of the politicians but for the public, so unless there are good reasons as to why it should not be disclosed such as national security, everyone should have access. Of relevance to this paper, included in the countries that have enacted legislation to give effect to this right are Australia,¹⁰⁵ France,¹⁰⁶ the UK¹⁰⁷, the US¹⁰⁸ and Uganda.¹⁰⁹

¹⁰³ UN Doc E/CN.4/1995/32, paragraph 35

¹⁰⁴ Banisar, D., “*The Right to Information in the Age of Information*” cited in “*Human Rights in the Global Information Society*” edited by Frank Jørgensen, R., (2006), p73

¹⁰⁵ Freedom of Information Act 1982

¹⁰⁶ 1978 Law on Access to Administrative Documents

This chapter focuses on the freedom of information, or more specifically, the right to access information. It will begin by reviewing the law both internationally and domestically in Uganda, and then elaborate on the linkages between the right to information and *all* other human rights.

4.1 International Law

In international law the right to access information is contained fairly extensively in a number of instruments. Initially, along with the above mentioned General Assembly Resolution, is Article 19 of the UDHR. A strong argument could be made that this non-binding Declaration is reflective of customary international law and Article 19 states that “Everyone has the right to freedom of opinion and expression; this right includes ... to seek, receive and impart information”. Even though this text is contained within the original document for what is now known as the International Bill of Human Rights, this freedom could be considered a privilege, as opposed to a right. The relevant difference being that a ‘right’ would imply positive obligations on the duty-bearer however; as there is no real effective enforcement mechanism this point is merely academic.

Article 19 of the ICCPR reiterates this text but also it was elaborated upon with a more open approach in 2011 by the Human Rights Committee (HRC) General Comment 34 which states that, “To give effect to the right of access to information,

¹⁰⁷ Freedom of Information Act 2000 and the Freedom of Information (Scotland) Act 2002

¹⁰⁸ Freedom of Information Act as amended in 2007 and 2009

¹⁰⁹ The Access to Information Act 2005

States parties should proactively put in the public domain Government information of public interest. States parties should make every effort to ensure easy, prompt, effective and practical access to such information.”¹¹⁰ The UN Special Rapporteur on the protection and promotion of the right to freedom of opinion and expression took the same stance in his 1999 Report which claimed that Article 19 ICCPR places a positive obligation on States to ensure access to information.¹¹¹

With regard to the human right impacts from operations of business enterprises, the Special Representative of the Secretary-General John Ruggie went even further than just suggesting that a positive obligation be placed on States to allow access to information, but that to meet their duty to *protect* they should, where appropriate, *require* business enterprises to communicate how they address human right impacts.¹¹² The Human Rights Council subsequently endorsed this framework and the commentary for this section goes on to say that this requirement to communicate is particularly appropriate where operation “pose a significant risk to human rights.”¹¹³ Hopefully it has been shown by the case studies in the preceding chapter that at least onshore exploration and extraction ventures in the oil and gas industry potentially pose a significant risk to human rights.

The African Charter does grant the right to *receive* information¹¹⁴ but not expressly grant the right to seek information and this was reaffirmed in the African Commissions’ most recent judgment on this Article¹¹⁵ whereby it continually

¹¹⁰ UN Doc. CCPR/C/GC/34 at paragraph 19

¹¹¹ UN Doc. E/CN.4/1999/64 at paragraph 12

¹¹² Guiding Principles on Business and Human Rights, Principle 3(d)

¹¹³ A/HRC/17/31, p9

¹¹⁴ Article 9

¹¹⁵ 313/05: Kenneth Good / Republic of Botswana

emphasises the right to *receive* information but also, gives examples on occasions when the State is required to provide information; in this case for criminal proceeding or to be informed of reasons for expulsion.¹¹⁶ However, the Commission has made a Declaration acknowledging that public bodies hold information as custodians of public good and grant the right to access such information to everyone.¹¹⁷ This Declaration also states that “everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right”.¹¹⁸ Furthermore, The African Commission adopted Resolution 167 (XLVII)¹¹⁹ which calls for the expansion of Principle IV of the 2002 Declaration and authorises the Special Rapporteur on Freedom of Expression and Access to Information to create and develop the draft model law for African Union (AU) Member States on Access to Information.¹²⁰ It would not be beneficial at this time to review this draft law but suffice to say that, although not yet complete, it attempts to represent the transparency and proactive disclosure principles for public and private bodies mentioned as well as accountability for effective governance.

The other regional human right conventions also contain access to information provisions; the ECHR at Article 10 and the American Convention at Article 13. In addition, provisions for transparency and accessing information are contained within a wide array of other international instruments such as the UN Convention against Corruption which Uganda ratified on the 9th September 2004,¹²¹ the 1992 Rio

¹¹⁶ *Ibid.*, paragraphs 191 - 195

¹¹⁷ Declaration of Principles on Freedom of Expression in Africa 2002, Principle IV

¹¹⁸ *Ibid.*

¹¹⁹ Resolution to modify the Declaration of Principles on Freedom of Expression to include Access to Information and Request for a Commemorative Day on Freedom of Information

¹²⁰ Available at http://www.achpr.org/files/instruments/access-information/achpr_instr_draft_model_law_access_to_information_2011_eng.pdf

¹²¹ Article 13(1)(b): “Ensuring the public has effective access to information”

Declaration on Environment and Development,¹²² and the General Assembly draft Resolution of the 24th July 2012 on sustainable development.¹²³

The IMF revised their ‘Guide on Resource Review Transparency’ in 2007 which applied the principles of their Code of Good Practices on Fiscal Transparency; contained within was a whole section entitled “Public Availability of Information”.¹²⁴ Other international initiatives such as the EITI and the Publish What You Pay campaign exist to promote transparency either generally or specifically in the oil, gas and mining sectors; admittedly both have their critiques but neither operate in Uganda currently.

Although a piece of domestic legislation in the US, the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act contains provisions requiring extractive industry companies to register and produce annual reports of how much they are paying to foreign governments.¹²⁵ Again this legislation is not without its critique¹²⁶ but theoretically should be applicable to any company listed in New York Stock Exchange; this includes Total and CNOOC.¹²⁷ This already happens in the Hong

¹²² Principle 10: “At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities”

¹²³ UN Doc. A/66/L.56 at paragraph 43: “We underscore that broad public participation and access to information ... are essential to the promotion of sustainable development.”

¹²⁴ Pp 43 - 56

¹²⁵ Section 1504. Disclosure of Payments by Resource Extraction Issuers

¹²⁶ Greenspan, A., ‘Dodd-Frank fails to meet test of our times’, Financial Times, 29 March 2011 available [online] at <http://www.ft.com/intl/cms/s/0/14662fd8-5a28-11e0-86d3-00144feab49a.html#axzz2HldekWFy> and MacNamara, W. and Thompson, C., ‘Shell chief’s warning on Dodd-Frank’, Financial Times, 2 March 2011, available [online] at <http://www.ft.com/cms/s/0/f5dcb758-450a-11e0-80e7-00144feab49a.html#axzz2HldekWFy>

¹²⁷ Matsiko, H., ‘Secret oil deals’, The Independent, 9 September 2012, available [online] at <http://www.independent.co.ug/cover-story/6404-secret-oil-deals->

Kong Stock Exchange¹²⁸ and there have been calls for similar legislation to be enacted in Europe, which then would presumably also be applicable to Tullow.¹²⁹

4.2 Ugandan Law

The Right to access information was originally guaranteed domestically in Uganda via the Constitution. Article 41(1) states that, “Every citizen has a right of access to information in the possession of the State”. This was later elaborated upon by the enactment of the Access to Information Act 2005 which will now be considered in detail.

Section 5(1) of the 2005 Act verbatim reads that “Every citizen has a right of access to information and records in the possession of the State or any public body”. Section 4 defines “information” to include written, visual, aural and electronic information. This section also defines “record” to mean any recorded information, irrespective of whether the public body created it.

Of interest, although possibly irrelevant, it should be pointed out that “Public body” is given slightly different definitions between Section 2 and Section 4 of the 2005 Act; one presumes that the regardless it will be applicable to whatever authority, whether governmental or independent, that is administering the oil and gas sector at the time.

¹²⁸ *Supra* note 85, p18

¹²⁹ MacNamara, W., and Thompson, C., ‘EU closer to US-style financial reform’, Financial Times, 3 March 2011, available [online] at <http://www.ft.com/cms/s/0/32b8327e-45ce-11e0-acd8-00144feab49a.html#axzz2HIdkWfY>

Significantly though, the 2005 Act does provide protection for whistle-blowers,¹³⁰ as does Principle IV of the aforementioned 2002 African Declaration however, only a narrow provision for proactive and routine publication of information is contained in the 2005 Act requiring publication of automatically available information every two years.¹³¹ There is a mandatory disclosure of information upon request provision if deemed in the “public interest” based on either a failure to comply with the law or, where there is an *imminent* or *serious* public safety / health or environmental risk.¹³² Again though, this criterion seems somewhat narrow and subjective as another condition is that “disclosure of the record is greater than the harm contemplated”.¹³³ Other key sections worth a mention include Sections 27 and 28, which protects the commercial information of a third party (discussed in more detail in the following chapter), Section 18 which says that if the information officer fails to give a decision upon a request for information it should be understood as having been refused, and Sections 37 and 38 which allow for appeals to the Chief Magistrate and then the High Court.

Finally, in February 2008 Uganda’s Ministry of Energy and Mineral Development published the National Oil and Gas Policy (NOGP)¹³⁴ that emphasises the importance of transparency, describing openness and access to information as “fundamental rights”.¹³⁵ Of course this is not law, just a guiding principle, but both proposed oil Bills introduced to regulate the sector for future exploration and exploitation licences

¹³⁰ Section 44(1)

¹³¹ Section 8

¹³² Section 34(a)

¹³³ Section 34(b)

¹³⁴ Available at

<http://www.petroleum.go.ug/uploads/NATIONAL%20OIL%20AND%20GAS%20POLICY%20FOR%20UGANDA.pdf>

¹³⁵ NOGP, section 5.1.3

state their purpose as to operationalise the NOGP.¹³⁶ The Bills require that details of all agreements be made available to the public in accordance with the 2005 Act,¹³⁷ subject to a variety of clauses which are discussed in the following chapter. However, both Bills also contain a prohibition against disclosure of information except with the consent of the licensee,¹³⁸ non-compliance of which potentially involves criminal punishment; this seems to be inconsistent with the earlier mentioned whistle-blowers section in the 2005 Act.

4.3 Linkages

Although this paper primarily focuses on the Right to Information, which by comparison to the likes of the Right to Life, Non-Discrimination or not to be held in Slavery, may seem less significant, it is argued by this author that as it is equally important as one requires information for realisation of *all* other human rights. In effect, if one did not know about the scope and content of their rights, whether civil, political, economic social or cultural, then one is not able to determine if they are being respected. With reference to the nature of the obligations imposed by the ICCPR, HRC General Comment 31 states that the “Committee believes that it is important to raise levels of awareness about the Covenant”.¹³⁹ Information is particularly relevant for economic, social and cultural rights as successful implementation is not just in knowing that the rights exist but because the objective is progressive realisation based upon the highest attainable standard, data collected such as literacy rates, economic production and labour participation will serve as a key

¹³⁶ Section 2(1) of both Bill 1 and 2

¹³⁷ Bill 1, Section 148 and Bill 2, Section 76

¹³⁸ Bill 1, Section 150 and Bill 2, Section 78

¹³⁹ CCPR/C/21/Rev.1/Add. 13, paragraph 7

indicator as the effectiveness of this goal. In addition, the commentary to Ruggie Principle 26 notes that ensuring access to remedy includes access to information, to balance better business related claims of human right abuses.¹⁴⁰

A related right worth mentioning separately is the right and to participate in the conduct of public affairs, as guaranteed by Articles 21 and 27 of the UDHR and Article 25(a) of the ICCPR. Part of right includes the right of participation in the decision making process, including bidding of non-state actors for licenses or contracts with the State. Such agreements, as has happened in Uganda from a proposed refinery,¹⁴¹ may result in necessary displacement of citizens. The ILO Convention 169 says that relocation should take place only with free and *informed* consent of affected peoples.¹⁴² The General Comment to Article 25 also suggests that the information should be specifically tailored for the recipient and gives examples of making the information available in the language of any minorities and other methods to cater for the illiterate to allow them to make a contribution based on informed consent.¹⁴³ If decisions to allow large-scale operation are made then, although regrettable, an impact is likely to be felt and displacement a possibility however, having sufficient access to information of sufficient quality, would allow for the planning and adaptation of ones lifestyle, to ensure that people are still able to pursue their own goals such as independently earning a sufficient income to support a family. Alternatively, one could take the view that an inclusive consultation should take place prior to decisions being made in order to minimise any social impact.

¹⁴⁰ *Supra* note 112, p24

¹⁴¹ Ssekika, E., 'Many could miss out on oil refinery compensation', The Observer, 6 November 2012 [online], available at: http://www.observer.ug/index.php?option=com_content&view=article&id=21957%3Amany-could-miss-out-on-oil-refinery-compensation&Itemid=96

¹⁴² Indigenous and Tribal Peoples Convention, 1989 (No. 169), Article 16(2)

¹⁴³ CCPR/C/21/Rev.1/Add.7, General Comment No. 25, paragraph 12

Finally, although there is nothing explicitly in the UN Charter, the UDHR or either of the Covenants on environmental protection, the right to a general satisfactory environment could be said to be implied within other rights and, it is contained within the African Charter.¹⁴⁴ Perhaps it was not envisioned when most of these instruments were drafted however, the attitude of the international community via the UN had apparently modernised by 1972 when at Stockholm it was declared that “Man has the fundamental right to ... an environment of a quality that permits a life of dignity and well-being”.¹⁴⁵ These principles were reaffirmed by the General Assembly in 1994¹⁴⁶ and the Commission on Human Rights in 2001. Judge Weeramantry of the International Court of Justice stated in an opinion that the “protection of the environment is ... a vital part of contemporary human rights doctrine”¹⁴⁷ and the UN Committee on Economic Social and Cultural Rights (CESCR) has said that right to health includes the right to a healthy environment.¹⁴⁸ The right to a clean and healthy environment is also contained within the Constitution of Uganda¹⁴⁹ and the National Environment Act, Cap 153 domesticates international environment instruments and creates an authoritative body to supervise and manage all activities in Uganda.¹⁵⁰ It expressly provides for the right to a healthy and obligates each person to protect the environment.¹⁵¹ Section 52 of this Act makes it an offence for any person to fail to minimise the waste generated by their activities. The relevance being (as will be

¹⁴⁴ Article 24

¹⁴⁵ Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) 1972, Principle 1

¹⁴⁶ General Assembly Resolution 45/94

¹⁴⁷ Case concerning *Gabcikovo-Nagymaros (Hungary v Slovakia)*, 1997 ICJ Rep 7 (separate opinion of Justice Weeramantry), p4

¹⁴⁸ General Comment No. 14, UN Doc. E/C.12/2000/4, paragraph 4

¹⁴⁹ Article 39

¹⁵⁰ Sections 4 - 6

¹⁵¹ Article 3

shown later), some would consider the failure to fulfil the obligation to provide *environmental* information specifically, a violation of several other affected rights.

4.4 Summary

It has been shown that since 1946 the right to access information is contained fairly extensively in a variety of international instruments which include the UDHR and ICCPR. Furthermore that this right is linked to and essential for the realisation of other fundamental human right and may even be said to be a necessity for a functioning democracy. Many States have domestically implemented Access to Information legislation supplementary to their international obligations and many more have proposed such legislation.

It is debateable whether this right imposes positive obligations on the State but the discussion is not just about accessing information; consideration has to be given as to the quality, accuracy and completeness of information. Comprehensibility is also a factor; whether governments should be required to arrange the data in format understandable to lay person. The UN Framework goes even further and suggests that in order to fulfil their duty to *protect*, business may be required to actively communicate relevant human right impact information to stakeholders.

In addition there are also several ‘good practice’ initiatives aimed at promoting transparency such as EITI or Publish What You Pay, but these are voluntary and not operating in Uganda. There has been talk and attempts at legislating at the ‘home’

States in the US, Asia and Europe for transparency requirements when dealing with foreign governments, but these are not without their critiques. However, the right to information is constitutionally guaranteed in Uganda and the law also provides a separate supplementary Access to Information Act although it is unclear how this will be reconciled against seemingly incompatible new legal amendments which regulate the new oil sector.

5. Rights to Privacy and Property

A basic argument on the concept of separate legal identity simply requires the citation of something not dissimilar to the, albeit often criticised, landmark ruling from the UK of *Salomon v A. Salomon & Co. Ltd*¹⁵² whereby the House of Lords upheld the doctrine of corporate personality. Around the same time the US Supreme Court recognised corporate citizenship when it claimed that "corporations are persons within the meaning of the constitutional provisions forbidding the deprivation of property without due process of law".¹⁵³ This chapter will attempt to ascertain a validation for the company's right to privacy, and the State's justification for secrecy, if there is one.

5.1 Company Rights

The *human* right to privacy is contained in both the UDHR¹⁵⁴ and the ICCPR¹⁵⁵ with practically identical wording: "No one shall be subjected to arbitrary or unlawful interference with his privacy ... or correspondence, nor to unlawful attacks on his honour or reputation."¹⁵⁶ Both articles require states to adopt appropriate legislative measures to protect against such interference; the Ugandan and other measures are

¹⁵² [1897] AC 22

¹⁵³ *Covington and Lexington Turnpike Road Co. v Sandford* 164 US 578 (1896) at 592

¹⁵⁴ Article 12

¹⁵⁵ Article 17

¹⁵⁶ ICCPR, Article 17.1

briefly considered below. The General Comment to Article 17¹⁵⁷ acknowledges that “unlawful” mean interference not envisioned by law¹⁵⁸ and “arbitrary interference” can extend to interference that *is* provided by law to ensure that such law is in accordance with the “provisions, aims and objectives of the Covenant”.¹⁵⁹ This Comment also highlights the need for a reasonableness consideration¹⁶⁰ and points out that the English word “home” should be understood to have the definition of the French word “domicile”, meaning that it can be both “where a person resides or carries out his usual occupation.”¹⁶¹ The four-part test of non-arbitrariness, provided for by law, in accordance with the Covenant and reasonableness was applied in the most recent session of the Human Rights Committee on the 27th November 2012 in *Liliana Assenova Naidenova et al. v Bulgaria*.¹⁶² It should also be noted that, although they made a Reservation regarding the competence of the Human Rights Committee to consider a matter that has already been considered by an alternative investigation procedure, Uganda acceded to the Optional Protocol to the ICCPR on the 14th November 1995 which allows for individual communications, although to-date none have been submitted.

Interestingly though there is no mention of the right to privacy in the African Charter however, it does appear at Article 8 of the ECHR and Article 11 of the American Convention. The American Convention doesn’t appear to add much to the instruments already mentioned however the ECHR includes a necessity condition, and lists an exhaustive legitimate aim requirement which includes “public safety”, “the

¹⁵⁷ CCPR General Comment No. 16

¹⁵⁸ *Ibid.*, paragraph 3

¹⁵⁹ *Ibid.*, paragraph 4

¹⁶⁰ *Ibid.*,

¹⁶¹ *Ibid.*, paragraph 5

¹⁶² Communication No. 2073/2011, CCPR/C/106/D/2073/2011 at paragraph 14.3

economic well-being of the country”, “the prevention of crime”, “the protection of health” and “the protection of the rights and freedoms of others”.¹⁶³ The European Court of Human Rights (ECtHR) recently found a violation of Article 8 as a result of the failure to establish necessity; even though the State is given a fairly large margin of appreciation, necessity is construed on a case-by-case basis and must be proportionate to a legitimate aim to fulfil a pressing social need.¹⁶⁴ The test for the ECtHR was set out in a case regarding a raid and seizure of documents from a business premises; it would seem that any interference with the right to privacy needs to be in accordance with law, have a legitimate aim and be necessary in a democratic society.¹⁶⁵

As mentioned the human right to privacy extends to business *premises*, but that does not necessarily follow that the right extends to the business itself. Even though human rights could be seen as an obstacle to business it has been argued that “the modern corporation is treated as a natural person by its ability to enjoy human rights and this recognition should have reciprocal obligations by placing the corporation on the same footing as an individual under international human rights law.”¹⁶⁶

Article 1 of the first Protocol to the ECHR, granting rights of property, recognises both to natural and legal persons. The ECtHR recognised corporate human right to freedom of expression in the case of *Autronic AG v Switzerland*¹⁶⁷ when it proclaimed that “In the Court’s view, neither Autronic AG’s legal status as a limited company nor

¹⁶³ ECHR, Article 8.2

¹⁶⁴ Case of *Nada v Switzerland* (Application no. 10593/08), Grand Chamber, 12 September 2012

¹⁶⁵ Case of *Société Colas Est. and others v France* (Application no. 37971/97), Grand Chamber, 16 April 2002

¹⁶⁶ Amao, O., “*Corporate Social Responsibility, Human Rights and the Law: Multinational corporations in developing countries*”, (2011), p109

¹⁶⁷ (Application no. 12726/87), Court (Plenary), 22 May 1990

the fact that its activities were commercial ... can deprive Autronic AG of the protection of Article 10 ... [it] applies to “everyone”, whether natural or legal persons.”¹⁶⁸ This was reaffirmed by the Grand Chamber in 2012 in the case of *Axel Springer AG v Germany*;¹⁶⁹ in the Courts assessment of this case it noted the importance of “public interest”.¹⁷⁰ So it would seem that the ECtHR are willing to apply human rights to legal entities, but it seems unclear exactly which human rights a corporate entity can have. Surely some, such as the prohibition of torture¹⁷¹ and the right to marry¹⁷² do not apply. It seems that it would be very contentious to say the human rights that so apply to non-human entities should provide the same degree of protection. More specifically for this paper, it is debatable whether legal entities have or can have a human right to privacy. To the best of the authors’ knowledge, this question has not been answered by international law so relevant domestic legislation and case law from Uganda and other jurisdiction will now be considered.

The right to privacy is contained within Ugandan Constitution¹⁷³ however it is not an absolute right as a limitation, or derogation, is provided for by Article 43(1): “In the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.” Uganda does not have a specific data protection or privacy regulator so it is the Uganda Human Rights Commission that bears responsibility to ensure compliance with international obligations. The Ugandan High Court has found that a corporate body can be a “citizen” under Article 41 of the Constitution in relation to the right of

¹⁶⁸ *Ibid.*, paragraph 47

¹⁶⁹ (Application no. 39954/08), Grand Chamber, 7 February 2012

¹⁷⁰ *Ibid.*, paragraph 79

¹⁷¹ ECHR, Article 3

¹⁷² ECHR, Article 12

¹⁷³ Article 27

access to information¹⁷⁴ however it is unclear whether the Ugandan judiciary should or would also grant legal entities rights as a “person” via Article 27 of the Constitution, allowing the right to privacy.

Last year the US Supreme Court in a Freedom of Information case¹⁷⁵ distinguished “personal privacy” which it claimed that corporations do not have, with the term “person”, which it said can refer to a legal entity such as the respondent corporation. As a result it would seem that the right to at least partial privacy is granted to legal entities when dealing with exemptions to the Freedom of Information Act in the US; this includes trade secrets and commercial or (in some cases) financial information but not “personal” files and the data protection of the company (as opposed to the protection of individual employees).

Data protection may be a right applicable to companies and could be said to be about informational self-determination; how to control information about oneself and how used.¹⁷⁶ There are of course limitations such as disclosure deemed in the public interest such as sex offender registers.¹⁷⁷ Authoritative instruments worth noting include the OECD Guidelines on Privacy¹⁷⁸ and the EU policy of the protection of personal data;¹⁷⁹ both recognise that if the right to privacy has to be invaded, it must be with minimal intrusion. In addition, both of these are addressed only to individuals

¹⁷⁴ Greenwatch Ltd v Attorney General & Uganda Electricity Transmission Company Ltd, HCCT-OO-CV-MC-0139 of 2001 (High Court of Uganda)

¹⁷⁵ Federal Communications Commission et al. v AT&T Inc. et al 562 US ____ (2011)

¹⁷⁶ *Supra* note 104, p128

¹⁷⁷ *Ibid.*, p128

¹⁷⁸ OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data (23 September 1980)

¹⁷⁹ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, as amended and supplemented

so a company right could be distinguished as it is for the protection of economic activity or commercial confidentiality, as oppose to personal data or privacy. However, it has been said that “The data protection laws of some jurisdictions such as Austria, Italy, Argentina and Switzerland, expressly protect the privacy rights of collective entities. The South African Reform Commission also has expressed a preliminary view that privacy law should provide some protection both types of legal person”.¹⁸⁰

One could contrast the position of the US, whereby the Supreme Court acknowledged the right to privacy for business, albeit (again) not to the same extent as with individuals, by setting limitations upon forced entry for investigation to commercial establishments in *See v City of Seattle*.¹⁸¹ It went even further a decade later in *Marshall v Barlow's Inc*¹⁸² when the Court said that warrant-less searches of business premises were unconstitutional, although exceptions of pervasively regulated business or closely regulated industries can be made.

Alternatively in Australia it is thought that the Privacy Act should not be extended to non-human legal entities as privacy is a *human* right and therefore to extend this would be inconsistent with “the fundamental approach of Australian privacy law.”¹⁸³ The view seems to be that there are more appropriate avenues for protecting the information rights of corporate entities, some of which will now be briefly considered.

¹⁸⁰ Australian Law Reform Commission, ‘Australian Privacy Law and Practice’, (2008), Volume 1, Report 108, p352

¹⁸¹ 387 US 541 (1967)

¹⁸² 436 US 307 (1978)

¹⁸³ *Supra* note 180, Paragraph 7.58

It seems likely that the PSAs in question would provide for confidentiality so, if the State (or even the business) were to disclose “confidential information” they would risk other party claiming remedy, most likely as some specified private international arbitration, based breach of trust. Part of this law includes intellectual property such as trade secrets which could be a process (such as the method of oil extraction) or a product, the disclosure of which could theoretically harm the financial prosperity of the business as it may hold economic value or give a competitive advantage. This could also include copyright, which may be the industrial design of equipment used, however the right to exclusively have intellectual property kept private is not indefinite. One thought is that on a long enough time-line everything should be released, the rational being that as a society we should share collective knowledge but without removing benefits of creator. Too much “protectionism” of intellectual property actually harms creativity and innovation as we build upon existing ideas; a process known as reverse engineering.

5.2 State Justification

The remainder of this chapter will consider possible justification the State may give, aside from the aforementioned contractual obligations, to insist on secrecy. In theory, “Governments should make public government information unless there are sounds policy reasons why not.”¹⁸⁴ Chapter 15 of the Constitution of Uganda contains the provisions for the management of the “land and environment.” Interestingly Article

¹⁸⁴ Dean, R., “The Law of Trade Secrets and Personal Secrets”, Second Edition, Thomson & Lawbook, (2002), p11

244 establishes that “control of, all minerals and petroleum in ... Uganda are vested in the Government on behalf of the Republic of Uganda.” Prior to a 2005 amendment when this Article only referred to “Minerals”, it was Parliament’s role to regulate exploitation. This wording is reiterated in Section 5 of Bill 1. One could speculate that the term ‘Republic’ now justifies the Executive controlling the sector and not require parliamentary approval. Having said that, it is still one of the functions of Parliament to scrutinise government and promote democracy;¹⁸⁵ this must be a hard task if the legislature is given little or no information.

No conditions are set of Article 19 of UDHR however Article 19(3) of the ICCPR sets restrictions on the right to information in that the rights of others must be respected and for the “protection of national security or of public order, or of public health or morals.” As mentioned the African Charter does not grant the right to seek information but Part IV of the draft model law for AU Member States on Access to Information lists a fairly comprehensive set of exceptions which include where it would release personal information,¹⁸⁶ trade secrets or information that would substantially prejudice the legitimate commercial or financial interest of a third party,¹⁸⁷ and importantly, information that would cause substantial harm to the economic interests of the State.¹⁸⁸ However, information cannot be exempt merely as it is deemed as “classified”¹⁸⁹ and, there is a public interest override provision.¹⁹⁰ The ECHR restrictions are that it must be prescribed by law and necessary in a democratic society; which includes the protection of the rights of others and preventing the

¹⁸⁵ Constitution, Article 79(3)

¹⁸⁶ Article 38

¹⁸⁷ Article 39

¹⁸⁸ Article 43

¹⁸⁹ Article 37

¹⁹⁰ Article 38

disclosure of information received in confidence.¹⁹¹ The American Convention restrictions also contain a provision to protect the rights of others.¹⁹²

As mentioned Article 41 of the Constitution of Uganda provides the right of access to information however it also includes the limitation whereby the release of such information “is likely to ... interfere with the right to the privacy of any other person.” In the current scenario then it would seem that the only possible justification to derogate from fulfilling their obligation to allow access to information is to protect the rights of others (the other parties to the agreement), which were discussed above.

Domestically, Section 5(1) of the Access to Information Act in Uganda contains the exception “where the release of the information is likely to ... interfere with the right to the privacy of any other person.” Section 27 and 28 of that Act are specific provisions which protect commercial information of a third party and confidential information. Section 59 of the Petroleum (Exploration and Production) Act 1985 contains a prohibition against disclosure of information with the possibility of imprisonment for a breach of up to two years.¹⁹³ Both Bills contain prohibitions against the disclosure of information with a penalty of a fine *and*, a prison sentence of up to five years.¹⁹⁴ This may seem harsh until one considers that Article 61 of the World Trade Organization TRIPS Agreement¹⁹⁵ states that “Members shall provide for criminal procedures and penalties ... including imprisonment and/or monetary fines”. It should be pointed out though that as all this is domestic legislation the State

¹⁹¹ ECHR, Article 10(2)

¹⁹² Article 13(2)(a)

¹⁹³ Section 59(3)

¹⁹⁴ Bill 1, Section 150(4), Bill 2, Section 78(3)

¹⁹⁵ Agreement on Trade-Related aspects of Intellectual Property Rights

could alter it if it felt that it was incompatible with its international human right obligations.

5.3 Summary

In summary then, it would appear that there is no established international law of privacy applicable to non-human legal entities, although it has been applied domestically. Even if one were to allow business to have a human right to privacy it would appear that it is to a differing extent than to individuals. In addition, if one were to claim that the business' applicable human right was to intellectual property, then there should still be limitations set. If it was claimed to be a tangible property such as profit and disclosure of information would amount to an expropriation of this, one would need to view this as purely speculation, and an opinion to which experts would likely disagree.

The State could potentially be justified in insisting on privacy however it would appear that the only justification contained currently in law is the protection of the rights of others. Either party may also claim to be contractually bound to secrecy.

6. Application in Court

There is but one relevant precedent to which this author is aware of whereby the situation contemplated by this paper has gone to Court in Uganda and, none yet at the African Commission. With the greatest respect to the Judge involved, perhaps they did not take into account the complexities of this emerging branch of international human rights law. Consequently this legitimises review of this case and a look at how other perhaps more developed jurisdictions, with regard to freedom of information and privacy, will also be considered.

6.1 Uganda

The case came before the Chief Magistrate's Court of Nakawa in 2009.¹⁹⁶ The applicants, Charles Mwabguhya Mpagi and Izama Angelo, requested from the Permanent Secretary at the Ministry of Energy and Mineral Resources and, the Attorney General, certified copies of agreements made between the government and different oil companies for exploration and prospecting. The Permanent Secretary did not make an immediate direct response and so was deemed to have refused under the earlier mentioned Section 18 of the 2005 Act.¹⁹⁷ The Attorney General refused on the basis that there was a confidentiality clause in the contracts and therefore would need the consent of the oil companies involved otherwise it would amount to a breach of contract as per Section 28(1)(a) of the 2005 Act and an infringement of privacy. The

¹⁹⁶ Mpagi v Attorney General, no. 751 of 2009

¹⁹⁷ See Section 4.2

applicants were asking for a mandatory disclosure under Section 34 of the 2005 Act as it, they claim, would be in the “public interest”. The applicants claimed that the benefit would outweigh the harm.

The Chief Magistrate stated that the plea of breach of contract as a defence, once the matter was before a court of law, was not sustainable. In effect, if a court order for disclosure was made against an information officer, relying on a confidentiality and privacy clause is no longer plausible as an order of the court supersedes any agreement between the parties. However in this instance the disclosure request was refused on the basis that the applicants failed to show that the action was in the public interest and, how they would use the information to bring the government to be more transparent, accountable and efficient in the management of the oil resources.

Although, as has been shown, it is very widely utilised in legal instruments, the term “public interest” is undefined. This is hardly surprising because surely the best interests of the public are both subjective and, a matter of opinion. More discussion on this point follows in the following chapter but first, relevant cases from other jurisdictions will be considered.

6.2 Europe

The ECtHR found a violation of Article 8 (right private life) in favour of the applicant after the governments’ failure to provide the local population with

information about the risk factor and how to proceed in event of an accident at nearby chemical factory.¹⁹⁸

In this case the applicants lived 1 km from a chemicals factory which released large quantities of inflammable gas that could have led to explosive chemical reactions, releasing highly toxic substances; this was not disputed by the government. In addition it was not disputed that accidents had happened in the past.¹⁹⁹ When it went to criminal trial most directors escaped jail with a fine; all but two, but these were overturned on appeal. During this investigation a committee was established to report on whether the factory conformed to environmental regulations and the problems found were raised in a parliamentary question. The basis of the complaint was that the authorities failed to inform the public on the hazards to which they were now aware and about the procedures that should be followed in the event of a major accident. It was claimed that this amounted to an infringement on their right to freedom to information as per Article 10 of the ECHR. Although it was not in original plea a claim was added under Article 8, given the close proximity of the factory to the applicants' residence.

By 18 votes to 2 the Court held that no positive obligations existed via Article 10, only negative ones.²⁰⁰ It would seem then that the right to receive and impart information in Europe prohibits governments from restricting a person from receiving information that others wish or may be willing to communicate (perhaps like the oil companies in Burma or maybe Uganda) however, in relation to the additional claim

¹⁹⁸ Case of Guerra and others v Italy, (116/1996/932), Grand Chamber, 19 February 1998

¹⁹⁹ *Ibid.*, Paragraph 15

²⁰⁰ *Ibid.*, Paragraph 53

the Court held unanimously that the State has positive obligations under Article 8. It stated that Article 8 “does not merely compel the State from such [arbitrary] interference: in addition to this primary negative undertaking, there *may* [emphasis added] be positive obligations inherent in effective respect for private or family life”.²⁰¹

The relevance here is that this case acts as an example whereby the ECtHR has found the public right to receive information of public interest; as the town was exposed to danger, the respondent State had not fulfilled its obligations to secure the applicants right to respect for their private and family life by providing the relevant information. It should also be noted that the potential for severe pollution may have affected the applicants’ well-being so being informed was essential. Finally it is worth mentioning that even though the debate for this paper is being framed as two opposing competing rights, this case, which could also be considered as a rivalry between the public right to information and the business entity’s right to privacy which would allow them to have the PSA’s remain secret or confidential, should be a reminder that the public even though claim the right to access information simultaneously remain in possession of the right to private life. In addition, it should be noted that this was not a general right of access; the applicants had to show an association to the events.

²⁰¹ *Ibid.*, Paragraph 58

6.3 Australia

In Australia, since the Freedom of Information Act 1982, information about public departments and how they operate are available to the public in every region. The usual exceptions are there which include public interest and private / business affairs²⁰² however; if an applicant in Australia is refused access to information then they can seek internal review.

In a case before the Supreme Court of Victoria,²⁰³ an appeal was dismissed which claimed that access to documents containing details of an accident investigation conducted by an employer should be refused as the contents would disclose identities of confidential sources of information²⁰⁴ and, that the documents contained information of business, commercial or financial nature;²⁰⁵ therefore falling under the exceptions of the 1982 Act. It was stated that exceptions should be narrowly construed,²⁰⁶ and that if a request be made, the company should be notified and if they ask for an exemption (or maybe even without an initial request), it should be based on evidence. In effect though the onus or burden of proof falls on company wanting the exemption to disclosure; they need to show a legitimate possible prejudicial effect because it was not the intention to exempt every piece of information with these statutory exceptions by simply labelling information as confidential.²⁰⁷

²⁰² Amap p 583 and Section 43(1) of the 1982 Act

²⁰³ Accident Compensation Commission v Croom [1991] 2 VR 322

²⁰⁴ Section 31(1)(c)

²⁰⁵ Section 34(1)

²⁰⁶ *Supra* note 203, at 323

²⁰⁷ *Ibid.*, at 330

In *Sexton Trading Company v South Coast Regional Health Authority*²⁰⁸ before the Office of the Information Commissioner in Queensland, the question was asked whether disclosure of the prices quoted by a successful tenderer for a contract to supply and install privacy curtains and blinds to the Respondent, could reasonably be expected to have an adverse impact on the business. In addition, the Information Commissioner was asked whether disclosure of the accepted prices would prejudice the future supply of said information. The applicant was the unsuccessful tenderer and so the basis of their interest was that by knowing the information they could determine whether they could match or beat these prices for future quotations but still maintain an acceptable margin. It should be noted the Applicant was asking, not for a full break down of the successful tenderer's pricing structure, but the company's name and accepted total price to be published. It was argued that the information should be public information as it is public money being spent. And that, to deny access prohibits the people from assessing whether the Council's Purchasing Guidelines were adhered to.

It was held that although business confidentiality is an exception to the Freedom of Information Act, prices quoted for services to government were not subject to this exception and that the applicant has a right to be given access to this information.²⁰⁹ In addition, the Information Commissioner's decision notes that, "there is no reasonable basis for an expectation that disclosure of the matter in issue would prejudice the future supply of such information to government."²¹⁰ The reason for this being is that the Commissioner took the view that the information is supplied

²⁰⁸ (1995) 3 QAR 132

²⁰⁹ *Ibid.*, paragraph 27

²¹⁰ *Ibid.*, paragraph 14

only so that the tenderer could gain some benefit (financial profit) from the government ergo, as there are no shortage of suppliers, if they wished to continue receive said benefit they would continue to provide the information. Even where it was accepted that pricing information *has* a degree of commercial sensitivity in a competitive market, this is lessened when it is historical.²¹¹

The Information Commissioner in Western Australia went even further in a case which centred on a call for tenders to bid for the supply of Photo-Licence Equipment for police authorities;²¹² in this scenario the Commissioner allowed for disclosure of unsuccessful company quotes. This case differentiated the information in terms of “trade secrets” or information “that has a commercial value”.²¹³ Of interest, during investigation it became apparent that the companies themselves did not object to the release of basic information,²¹⁴ only the specific pricing and processes that they were proposing to perform. It was held that some information can be disclosed but anything affecting competitive advantage will not. Unsurprisingly, “public interest” is a relevant factor²¹⁵ and the judgement noted that even if some information satisfies the criteria for exemption to the Freedom of Information Act then it may still be disclosed if on balance, it is in the public interest to do so²¹⁶ however, it should be noted that it is a *public*, as oppose to individuals, interest override.²¹⁷

²¹¹ *Ibid.*, paragraph 16

²¹² Re Maddock, Lonie & Chisholm and Dept. of State Service [1995] WAIC 15 (2 June 1995)

²¹³ *Ibid.*, paragraph 24

²¹⁴ *Ibid.*, paragraph 13

²¹⁵ See Searle Australia Pty Ltd v Public Interest Advocacy Centre (1992) 16 AAR 28 and Colchovski v Australian Telecommunications Corp (1991) 13 AAR 261 at 269 – 270

²¹⁶ *Supra* note 212, paragraph 29

²¹⁷ Director of Public Prosecutions v Smith [1991] 1 VR 63 at 75

6.4 US

The US Supreme Court has said that when balancing the public interest in disclosure against the intrusion on personal privacy, the Court will only consider the public's interest in knowing the activities of the government (as oppose to data that happen to hold).²¹⁸ Additionally, the Court stated that while Freedom of Information exceptions include commercially sensitive documents generated by and submitted to the government, this does not necessarily follow that this would be protected against disclosure in a civil discovery process (pre-trial obtaining of evidence).²¹⁹

In 2012 a District Court ruled that the FBI must produce a full account of a confidential file regarding an informant that had been very close with civil rights leaders, to a newspaper investigating whether government surveillance was justified in the public interest or oppressive, under the Freedom of Information Act in *Memphis Publishing Company et al. v Federal Bureau of Investigation*.²²⁰ It was claimed that the FBI should not be expected to reveal a "confidential source" of information as it would breach the relationship of trust; whilst this is true, as the informant had died four years previous, it was unlikely that the FBI would be concerned that he would cease giving information. Secondly, it was acknowledged that the exclusion was not to protect a living informant but his decedents. This argument also failed as he had already been officially confirmed as a source and, the potential harm was not danger of bodily harm but possible stigma or embarrassment.

²¹⁸ U.S. Department of Justice et al. v Reporters Committee for Freedom of the Press et al. 489 U.S. 749 (1989)

²¹⁹ Federal Open Market Comm. v Merrill, 443 U.S. 340 (1979)

²²⁰ Civil Action No. 10-1878 (ABJ)

6.5 Summary

From this it should be highlighted that the Ugandan Court points out that a court order is superior to contractual obligations and that it is their contention that an applicant requesting information must show that it is in the public interest. The ECtHR seems hesitant to impose positive obligations on governments to provide access to information however they found it in the public interest where there was a possibility of environmental danger as this would negatively impact the right to privacy or family life of the applicant, a right which does impress positive obligations on the State. The Australian courts appear to have rejected the concept of information as property in order to achieve balance of free flow of commercial information. Exceptions to requests for disclosure of details should be based on evidence and the burden of proof falls on the business seeking privacy. As a result, the basic details of both successful and unsuccessful bids for government contracts have been made available. When balancing the rights to information and privacy in the US, public interest is only considered with regard to knowing the activities of government and, although commercially sensitive documentation is an accepted exemption, a court procedure can overrule. Finally from the US, it would seem that embarrassment to the information provider is not sufficiently harmful to justify non-disclosure.

6. Analysis

This chapter will be split into three parts; it will begin by identifying the main thematic issues identified in the preceding chapters, each reflective of the rights being claimed by the relevant parties in Uganda. A considering the current factual basis which surrounds these issues will follow and finally this chapter will provide an evaluation.

6.1 Issues

The first and main issue for the people of Uganda surrounds the transparency of the oil exploration and extraction agreements. Transparency has a key role in exposing and eradicating corruption and mismanagement; one should be wary of letting a single commodity dominate the economy such as has happened in Angola. More specifically, it would not be in the people of Uganda's interest to allow their economy to be heavily subjected to a boom and bust cycle of volatile or fluctuating petroleum prices. There are other aspects of relevance too such as becoming bound by secret arbitration for the settlement of disputes or stabilisation clauses if avoidable; although seen as a risk-mitigation tool that can induce investment they can result in inducing violations of human rights or simply negatively affect the economic prosperity of a State in this fast changing environment. Hopefully the public right to access information and the linkages to other human rights such as the effect the environment

let alone general health and well-being has been well established in chapter 4, as such there is no need to discuss further in the following section.

Secondly with regard to the companies operating, one should define or classify the right being claimed; one should establish whether disclosure of the details of their agreements be a violation of the right to privacy, or the right to property.

The third issue is the State's justification for secrecy. Specifically Clause 9 of Bill 1 which has been criticised for allowing too much discretion to the relevant Minister and the lack of parliamentary involvement. The right to participate in the affairs of government is guaranteed to every Ugandan citizen under their Constitution,²²¹ as well as the UDHR²²² and the ICCPR,²²³ this is practically done via elected officials²²⁴ and although there is supposed to be public participation in renewal of agreements, it is hard to see how State can justify non-disclosure and therefore no participation in future agreements as there is no contractual obligation for secrecy in place. One can take the view that the State needs to adopt a secrecy rule in order to attract investment. This author is not of the opinion that the oil industry will cease to operate unless that can do it privately.

Finally, it is worth noting that although this paper has drawn on the practices of other jurisdiction for illustration purposes, this author is aware that one cannot simply apply the principles elsewhere and that every State has different conditions and circumstances. This has been taken into account.

²²¹ Article 38(1)

²²² Article 21

²²³ Article 25

²²⁴ Constitution, Article 77

6.2 Facts

It needs to be determined which right is being claimed in contrast to the freedom of access to information; a non-human legal entity right to privacy or, the right of business' to property.

It was highlighted earlier that a variety of different courts are becoming more willing to apply extra-territorial jurisdiction for human right violations with business involvement. Consequently, if an entity has obligations one could deduce that they also have corresponding rights, in this case “human rights”. However, it seems perverse to apply the usual laws of jurisdiction to a claim by a company as theoretically they could claim violations in the jurisdiction of domicile; against the principles of State sovereignty, which could lead to a situation of forum shopping and even market competition of laws to attract big business. As a result it seems logical to say that the rights being claimed by business are the one applicable where they are operating. It was established earlier in detail that regionally, there is no right to privacy contained within the African Charter, only the in ECHR & American Convention; neither of which applicable to the situation in Uganda. The right is contained in the UDHR²²⁵ and the ICCPR,²²⁶ but this is an individual or maybe collective group right which extends to business *premises*, not to the business itself. The right to privacy is contained within the Constitution of Uganda, which *may* be

²²⁵ Article 12

²²⁶ Article 17

applicable to business,²²⁷ however it has two derogations; not infringing the rights of others and in the public interest. Individual business may then have the privacy domestically in Uganda, but surely not to the same extent as competing general public right.

It was shown that data protection laws are not applicable in this scenario as they are aimed at subject access, as oppose to the freedom of information of a third party. Even if one were to concede that bidding strategy is something that company would want confidential during the process of acquiring government contract or licences, it is difficult to comprehend what the concern is after the process is over; there is no apparent competitive advantage unless the information contained within is about specialist methods or data of value to the company, which even if the PSA were to be released could be restricted. It should be kept in mind that this author is not referring to detailed structured plans which a knowledgeable competitor could deduce the technology and methods used, simply the basic information of who will be carrying out the operations, under what conditions and the total revenue that will be received; one should not be able apply a blanket ban on such information simply by labelling it as “confidential”. Furthermore, other than possible reputational embarrassment, it is also somewhat difficult to see the harm in disclosing failed bids.

In summary then it has been shown that the right to information is well established in international law but the potential competing right to privacy, if applicable to companies is done so domestically, and even then to a lesser extent. So, with no apparent viable justification it would appear that the Uganda may not invoke the

²²⁷ see Section 5.1

provisions of its internal law as justification for its failure to perform its international obligations, as per Article 27 of the Vienna Convention on the Law of Treaties (1969).

Alternatively, as any claim for disclosure of information would likely come from law of confidence, as oppose to human right of privacy, the competing right is of property; one would again have to classify that as either intangible profits or intellectual property.

If it were a right to profit, a company could try and protect itself by insist on confidentiality as a type of pre-emptive self-help, as oppose relying on courts later for compensation. Still though surely the business should be required to show to an independent third party that that if disclosed, the company would likely suffer economically. This would appear to be a difficult thing to do because to make such a statement, about potential future profits, is merely speculative and a matter of opinion. Even if it was shown that the company had a legitimate reasonable belief that profits may be negatively affected by disclosure of information then a balance should be struck as an outright prohibition seems disproportionate when competing rights are involved.

Perhaps then the basis of a claim against disclosure would be based on intellectual property rights. The justification for allowing intellectual property to business enterprises surely has to be economic; after an initial investment the investor who took the risk of expenditure is entitle to enjoy the financial gain from that risk otherwise technological advances would be underdeveloped by the so-called ‘free-

rider' problem. Alternatively, some may claim that too much protectionism is anti-competitive as it can create a monopoly. It should be remembered that it was earlier pointed out that the Ugandan government appeared to specifically avoid such a scenario.²²⁸ However, this is a contract for resource exploration and exploitation, and so would appear to be not applicable. Trade secrets refer to process or products, the methods for extraction, not revenues. Even if the information asked for was to do with trade secrets or copyright, restriction on these are both time barred so again, an outright blanket ban would seem disproportionate.

In summary then, if the companies claim was based on property it would either need to show a legitimate and plausible concern for loss of potential profits or, even the confidential information should be released after a set period of time. Either way this should be decided upon by an independent third party applying concepts of proportionality.

It is possible the host governments, as oppose to the operating companies that insist on confidentiality when it comes to investment agreements. Democracy (as appears to be the chosen political system in Uganda) cannot flourish if the government operate in secret. Theoretically, to share the information benefits both the individuals concerned and society as a whole plus, it would seem, that the original information holder does not lose out. Even if disclosure meant less profit for the companies then the nature of business might simply require this to be recovered elsewhere, but this should not be the government of Uganda's concern. Presumably the State justification

²²⁸ See Section 2.2

would come from a contractual obligation as, as hopefully has been shown above, there is no justification for complete non-disclosure in human rights law.

As the *Guerra* case pointed out, in Europe there are no positive obligations on the State for access to information, but there are for the right to private / family life; perhaps the Ugandan government interpret this in the same way. As discussed, it is this author's contention that the extent of obligations to privacy differ between individual and company, but again, perhaps the Ugandan government disagree. It was suggested that disclosure of details were in the public interest but, perhaps it is thought that there is no potential danger and so no benefit will derive from releasing information. Maybe it is thought that by doing so it would make the State less attractive and so drive business away. The State could be justified in interfering with these rights if it would harm the economic interests of the State, as per the draft model law. It should be noted though that this is only a draft. It would seem that, to best of this author's knowledge, there is no legal basis for withholding information but, there is no obligation to provide it either.

It was mentioned above, and in some detail in Section 4.3, that the right to participate in public affairs is well established. However, this does not necessarily mean that parliament should be involved in the process, or that there has to be a national debate on the development policy as has often been said;²²⁹ perhaps it is felt that this would simply make the process too bureaucratic. One could argue that parliament is involved as it has the job of scrutinising the proposed Bills and enacting

²²⁹ *Supra* note 40

them into legislation and reviewing the work of government generally, also as mentioned, the Bills provide for public participation in the renewal of licences.

A few additional secondary points are worth mentioning though; the confidentiality clauses remain in conflict between Bills 1²³⁰ and 2,²³¹ and Section 44 of the 2005 Act with regards to whistle-blowing; the former criminalising it and the latter protecting it. Apparently to avoid corruption the State is going to use competitive bidding for all future contract,²³² although it is unclear whether this information will be made publically available. Finally, if Uganda was going to rely on the AU draft model law which allows for secrecy if in the economic interest of the State, it should also be pointed out that this draft also suggests a maximum period of 10 year period for non-disclosure.²³³

6.3 Evaluation

It would seem then that for the State at least, the point could be effectively argued either way; strictly speaking insisting on non-disclosure does not amount to a violation of international human rights law. Although they should implicitly read human rights clauses into the likes of stabilisation clauses. This may seem like a depressing result, as most who follow the situation would be hoping for an evaluation claiming otherwise but this paper remains adamant that the State should follow good practice like in Norway, which has a “petroleum register” to hold all the data

²³⁰ Section 150

²³¹ Section 78

²³² Discussed in Section 2.2

²³³ Article 49

collected by companies for the use of both private and state agencies.²³⁴ The relevance here is that it is an example of where business privacy is interfered with for the public good.

States should as good practice, with consent if they are concerned about arbitration penalties, release the basic details of the PSAs that they agree to even though they are not legally bound to as they as they have justifiable deniability and there is no world human right court. Even if consent is not given it would not be against their contractual obligations to state this as a kind of ‘name-and-shame’ exercise. It should be noted that bidding has yet to start for four of the five identified exploration areas in Uganda and so the PSAs could be altered accordingly. Not only would this assist with some of the critique identified in their last Universal Periodic Review,²³⁵ but to not do so would be poor governance and this is where politics takes over. One could say that even if the details were to be published then the majority would not understand. If that is the case then as an example of further good practice the State should also consider publishing the details in an understandable format, tailored for the needs of the people so that could be understood. This could be costly, but it does not have to be; as is the case in India where activist groups use laws to obtain information, hold public meetings and read aloud.²³⁶

However, business also has to be aware and take responsibility for its actions and transactions. Courts are increasingly becoming more receptive to extra-territorial jurisdiction and a business enterprise is knowingly funding corruption, or ought to

²³⁴ *Supra* note 45, p24

²³⁵ Human Rights Council Working Group on the Universal Periodic Review for Uganda, 22 July 2011, UN Doc. A/HRC/WG.6/12/UGA/1, paragraph 106

²³⁶ *Supra* note 104, p76

have known, then the responsibility is shared. All the companies operating in Uganda already have corporate social responsibility statements and disclosure of EIA's or human right impact assessments should be made available. Even though this is not a legal obligation economics and market mechanisms could have a part to play; if people were insistent upon only transacting with companies with good human rights records, this could prioritise the need to inform the people as business would want to promote their commitment to human rights. In addition, with legislation like the Dodd-Frank Act in US it is hoped that revenues paid to home States will be made available regardless. Even if the view is taken that there is no positive duty to provide information by the State, it is also pointed out that there is a negative one not to interfere which could be relied upon if the companies were concerned about breaching their contractual obligations and, the revenue received will appear on the yearly State budget anyway. At best, the confidentiality of the basic details referred to should be time restricted.

Domestically, although the State again does not have a positive obligation without claimable derogation to disclose the details, it would seem that if ordered by an authoritative court, it cannot rely on contractual obligations to refuse. In contrast to the judgement already made on the issue this author would claim that *everyone* has an interest because of the nature, scale and impact of the operations and, business should need to show just cause if it wanted to restrict. "Public Interest" demands publication as oppose to secrecy so the presumption should be in favour of disclosure. As a result the burden of proof lies with the company wishing for privacy that should be in accordance with a complete list of legitimate aims proscribed by law, as oppose to a general blanket reason for refusal; which could be vague or excessively broad. It

could be suggested that companies will flee, even if they were notified in advance that if bid is successful (or not) then some information will be subject to public disclosure, resulting in loss of revenue for the State. This seems so unlikely that it does not even deserve consideration. Furthermore, disclosure with consent is already envisioned by Bill 1;²³⁷ so as presumably both the Ugandan government and the companies operating there prioritise people, neither have a justification to withhold information about the investment and distribution of natural resources and, it is already prescribed by law, if the case went now, a court would have a hard time ruling against disclosure.

7.4 Summary

The issues of transparency and the public right to access information was already covered in an earlier chapter so it was not discussed again, but suffice to say that although it is well established, it comes with limitations and maybe only imposes negative obligations on the State. Also identified were the non-human entities right and whether privacy or property, neither could justify an outright blanket ban just because information has been labelled as ‘confidential’. That being said, although undesirable, there is no firm State obligation currently in law to provide details of the agreements that it makes unless maybe a real belief that the operations would violate other human rights. However, if challenged the State could not rely on contractual obligations as justification for non-disclosure, the rebuttable presumption should be in favour of disclosure and human right considerations should be read implicitly into investment agreements, specifically stabilisation clauses.

²³⁷ Section 149(1)(b)

Consequently, by way of recommendation, the State should insist on transparency concerning all revenues, negotiation and award of contracts. Non-disclosure should only be applied on the basis of strict necessity, as set out in law. The details of which should be made available in national budgets and voluntary international initiatives such as the EITI, and theoretically will correspond to the information supplied by companies as part of their own domestic legislative obligations.

8. Conclusion

The opening paragraph to chapter 3 of this paper gave a quote that suggested that that trans-national corporations frequently take advantage of ‘weaker’ developing countries. Whilst this author does not disagree with this statement it does not appear to be the case in the Ugandan oil sector; they appear to have specifically and deliberately avoided virtual monopoly situation, are happy to wait to for the extraction of oil or the issue of new exploration licences, at this stage are firmly stating that they wish to refine the oil themselves, have anticipated dangers by partially restricting gas flaring and have just begin a new legal dispute over chargeable and reclaimable VAT (this is separate from Capital Gains Tax arbitration in London). However, the people of Uganda are justified in being concerned as the devastating effects of a centrally-controlled revenue stream, not reliant on domestic taxation and a non-diverse economy have been shown.

In spite of the fact that there is no international standard for privacy to a non-human legal entity, it only exists in domestic law and that when the two come into conflict international law shall prevail. Also notwithstanding all the international, regional and domestic, treaties, resolutions, declarations, principles, guidance, judgements, reports, policy and legislation, and that it has been shown that access to information is required for the realisation of all other human rights, States retain sovereignty over their domestic information policies. Consequently if the government feels that it is more effective for an individual Minister to make decisions without consideration by

parliament then that is their privilege however, it is hard to see what benefit honest government would experience from secrecy.

Although the State is not bound to provide the details of the PSAs, independent courts have the authority to demand it as a court order is superior to contractual obligations. Optimistically when considering whether to do so they will take note of some of the jurisprudence highlighted throughout this paper and act accordingly. While this author believes that the Chief Magistrate was correct in the Mpagi case that contractual obligations are subordinate to court orders, it is felt that he misapplied the public interest requirement. Hopefully it has been shown with the use of the Guerra case at the ECtHR that potential environmental dangers should be prioritised. In addition, it appears that the Australian cases strike a better balance of fairness as they have a rebuttable presumption towards disclosure of information. One feels that even if this scenario were in a more restrictive jurisdiction like the US, as it relates to the activities of government, the outcome would be in favour of disclosure.

Whilst it is recognised and legitimate that the State would not wish to expose or lose confidential source information, it does not seem an applicable exception here. For one thing, the sources are not confidential, only the information is. Furthermore, it does not seem reasonable to suggest that the oil companies will cease trading unless they have confidentiality. In fact, it would appear that many would not object to transparency of the PSAs and that it is the State that insists on secrecy. If so, in principle it seems bad for State as generally it does not produce a good environment for democracy to flourish and breeds corruption but more specifically, open competition will result in better prices for the services provided.

If one were to legitimatise the claim of the non-human entities, in this case the oil companies, then the justification would be a choice between either, re-conceptualising human rights law and piercing the corporate veil and allowing the owners collective rights; neither seem appropriate. It is understandable that business may wish to have some details confidential, but a blanket ban on all information is too restrictive.

Irrespective of the fact that they enjoy a legal personality and can benefit from being able to claim rights, this is not and should not be to the same extent as natural persons. This is reflected in the fact that business will also have duties in international human rights law, but not to the same extent that the State has. The right to privacy is a human right that extends to business premises only, not to the business itself. Even if one were to say that companies do have the human right to privacy, and even if that were to the same extent as humans, then an assessment is still not simply one right against another because as it has been shown, the individual's right of information is applicable to everyone and not just one entity. Furthermore it is intrinsically linked to every other right, particularly the right of public participation and a health environment, which in itself is also linked to other rights such as health and life.

Even if the right claim is of property, when balanced in this scenario the public interest to access the PSAs appears greater than any potential loss, which in itself is difficult to see, that the business may experience. So in conclusion there is no justification for non-disclosure of the business' part in international human rights law. Furthermore it may be part of their due diligence obligations for business as they

should be wary of contracting when a confidentiality clause present as this heightens the risk of human rights abuse, particularly as courts are becoming increasingly willing to apply extra-territorial jurisdiction and hold business accountable for human right violations. Even if in the US the Supreme Court declares that the Alien Claims Statute is no longer appropriate in the Kiobel case, this author suggests that this outcome is inevitable as political pressure will eventually force the issue.

Ideally, all revenue streams should be clear, traceable and accounted for in the state's year budget, plus independently audited as it is the peoples' money. At best the so-called "spring-board doctrine" should apply limits upon the duration of an injunction. It appears unlikely that this would come from government but the courts could introduce such policy considerations limiting the use of protection. Before finalising and more agreements, the government of Uganda should insist that they release the details of any future PSAs in relation to the oil sector; they can even notify the potential bidders in advance that whether they are successful or not, the basic details of their bids will be subject to freedom of information legislation.

The release of (hopefully mandatory) EIAs and human right impact assessments could be a bit more difficult because the government may not own or even store these. In principle though the people have a right to know the information contained within these assessments and, as the State evidently do not have a right to prevent a third party from disclosing information then they should as part of their Corporate Social Responsibility. If the State do have this information it would be hard to see any justification for not releasing it as it would not even fall under the confidentiality clause of the PSA.

Other proposed good practice solutions include the Publish What You Pay initiative for business and the EITI for the State; currently Uganda has not joined the EITI. However, what could be an emerging practice is the home State requiring all companies listed on their stock markets to make publically available all payments made to host country governments; this already happens in the Hong Kong stock exchange, has recently been enacted in the US with the passing of the Dodd-Frank Act and, there is talk of the same for the EU meaning that theoretically it is already applicable to Total and CNOOC. As discussed earlier these are not without their critics, and it too early to tell whether it will achieve the desired result. Furthermore, as was pointed out the yearly State budget has to account for all revenue received from the sector so, although not as beneficial as all the details of the PSAs, it certainly seems like a step in the right direction of giving the public access to information the highest priority.

Bibliography

Articles

BBC

Unknown author, 'Uganda election: Yoweri Museveni wins fresh term', 20 February 2011

Unknown author, 'Uganda and Tullow sign deal to start oil production', 3 February 2012

Financial Times

MacNamara, W. and Thompson, C., 'Shell chief's warning on Dodd-Frank', 2 March 2011

MacNamara, W., and Thompson, C., 'EU closer to US-style financial reform', 3 March 2011

Greenspan, A., 'Dodd-Frank fails to meet test of our times', 29 March 2011

Blair, D., 'Tullow sues Heritage over Uganda tax bill', 18 April 2011

Pfeifer, S. & Croft, J., 'Shell's Nigeria pay-out could top £250m', 3 August 2011

Kavanagh, M., 'Tullow extols Kenya pipeline plan', 25 July 2012

The Guardian

Macalister, T., 'Tullow Oil given licence to flare Ugandan gas', 16 February 2010

Bergin Reuters, T., 'Tullow Oil sells stakes in Uganda to Total and CNOOC for \$2.9bn', 30 March 2011

Naagbanton, P., 'Shell has admitted liability but has a long way to go to make amends', 4 August 2011

Unknown author, 'AfDB to support East African's oil infrastructure scheme', 17 August 2012

Salau, S., 'Shell records 15,408 barrels of oil spill in 2011', 19 September 2012

The Independent

Matsiko, H., 'Secret oil deals', 9 September 2012

The New York Times

Unknown author, 'Total settles rights case', 29 November 2005

Kron, J., 'Uganda: Oil Industry Regulations Passed', 7 December 2012

The Observer

Mbanga, J., 'Uganda's crude oil to be exported', 26 July 2012

Ssekika, E., 'Total lifts lid on its oil plans in Uganda', 3 October 2012

Ssekika, E., 'Many could miss out on oil refinery compensation', 6 November 2012

Ssekika, E., 'Ugandan firms to bid for oil licences', 25 November 2012

Reuters

Biryabarema, E., 'Uganda eyes 40 pct stake in planned refinery', 20 July 2012

Biryabarema, E., 'Uganda energy ministry searching for oil refinery advisor', 7 September 2012

Biryabarema, E., 'Uganda ups oil reserves estimate 40 pct to 3.5 bln bbls', 17 September 2012

Biryabarema, E., 'Uganda plans competitive bidding for mining licences', 1 October 2012

The Wall Street Journal

Bariyo, N., & Amiel, G., 'Effort to Start Pumping Ugandan Oil Stalls', 4 September 2012

Books

Amao, O., "Corporate Social Responsibility, Human Rights and the Law: Multinational corporations in developing countries", (2011), Routledge

Davis, J., "Intellectual Property Law", 4th Edition, (2012), Oxford University Press

Dean, R., "The Law of Trade Secrets and Personal Secrets", Second Edition, (2002), Thomson & Lawbook

Frank Jørgensen, R., "Human Rights in the Global Information Society", (2006), MIT Press

Jay, R., & Hamilton, A., "Data Protection: Law and Practice", Second Edition, (2003), Sweet & Maxwell

Letnar Černič, J., "Human Rights Law and Business: Corporate Responsibility for Fundamental Human Rights", (2010), Europa Law Publishing

Journals

Coomans, F., "The Ogoni Case before the African Commission and Human and Peoples' Rights", International and Comparative Law Quarterly, Volume 52, July 2003

Schmidt, T.M., "Transnational Corporate Responsibility for International Environmental and Human Rights Violations: Will the United Nations' Norms Provide the Required Means?", (2005) 36 California Western International Law Journal 217

Reports

Australian Law Reform Commission, 'Australian Privacy Law and Practice', (2008), Volume 1, Report 108

Human Rights Council Working Group on the Universal Periodic Review for Uganda, 22 July 2011, UN Doc. A/HRC/WG.6/12/UGA/1

IMF Guide on Resource Review Transparency, 2007

International Finance Corporation, “Stabilization Clauses and Human Rights”, 27 May 2009

Progress report of the Special Rapporteur on the situation of human rights in Myanmar, Tomás Ojea Quintana, 7 March 2012, UN Doc. A/HRC/19/67

Special Rapporteur on Freedom of Opinion and Expression:
1995 Report, UN Doc E/CN.4/1995/32
1999 Report, UN Doc E/CN.4/1999/64

Tullow Oil plc, Corporate Responsibility Report 2011/12

United Nations Educational, Scientific and Cultural Organization, “Freedom of Information: A comparative Legal Survey”, Second Edition, 2008

United Nations Office of the High Commissioner for Human Rights, “Analysis of the Petroleum (Exploration, Development and Production) Bill, 2012 and the Petroleum (Refining, Gas Processing and Conversion, Transportation and Storage) Bill, 2012”, April 2012

NGO Reports

Amnesty International, “Nigeria: Petroleum, Pollution and Poverty in the Niger Delta”, June 2009

Civil Society Coalition on Oil in Uganda, “Contracts Curse: Uganda’s oil agreements place profit before people”, February 2010

EarthRights International, “Energy Insecurity: How Total, Chevron, and PTTEP Contribute to Human Rights Violations, Financial Secrecy, and Nuclear Proliferation in Burma (Myanmar)”, July 2010

EarthRights International, “Total Denial: A Report on the Yadana Pipeline Project in Burma”, July 1996

Global Witness, “Uganda’s petroleum legislation: Safeguarding the sector”, 28 February 2012

Human Rights Watch, “Transparency and Accountability in Angola: An Update”, April 2010

International Alert, “Oil and Gas Laws in Uganda: A legislator’s Guide – Oil Discussion Paper No. 1”, May 2011

Nigerian Conservation Foundation WWF UK and International Union for Conservation of Nature, Commission on Environmental, Economic and Social Policy with Federal Ministry of Environment (Abuja), “Niger Delta Natural Resources Damage Assessment and Restoration Project Scoping Report”, May 2006

Websites

African Research and Resource Forum: <http://www.arrforum.org/>

BBC: <http://www.bbc.co.uk/>

Bloomberg Businessweek: <http://www.businessweek.com/>

Business & Human Rights Resource Centre: <http://www.business-humanrights.org/>

Central Intelligence Agency: <https://www.cia.gov/>

CNOOC Limited: <http://www.cnooltd.com/>

Economy Watch: <http://www.economywatch.com/>

Extractive Industries Transparency Initiative: <http://eiti.org/>

Financial Times: <http://www.ft.com/>

The Guardian: <http://www.guardian.co.uk/>

International Monetary Fund: <http://www.imf.org/external/>

The New York Times: <http://www.nytimes.com/>

The Observer: <http://www.observer.ug/>

Reuters: <http://www.reuters.com/>

Total: <http://www.total.com/>

Transparency International: <http://www.transparency.org/>

Tullow Oil plc: <http://www.tulloil.com/index.asp>

Uganda Oil and Gas: <http://www.ugandaoilandgas.com/>

Uganda Wildlife Authority: <http://www.ugandawildlife.org/>

United Nations Treaty Collection: <http://treaties.un.org/home.aspx>

UN Office of the High Representatives for the Least Developed Countries,
Landlocked Developing Countries and Small Island Developing States:
<http://www.unohrlls.org/en/home/>

U.S. Department of State: <http://www.state.gov/>

Wall Street Journal: <http://uk.wsj.com/>

WiwavShell.org: <http://wiwavshell.org/>

World Bank: <http://www.worldbank.org/>