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Abstract

In 2017, France legislated a prohibition on domestic hydrocarbon exploration and production by 2040, in line with national carbon emissions reduction goals. As the law applies only to France or French territories, there is argued incentive for French-based companies to move their extractive activities abroad. France also passed in 2017 a remarkable 'due diligence' law—the Duty of Care Act—that holds large French companies responsible for impacts of their activities worldwide, including subsidiaries and the totality of their supply chains. The law's potential reach is unclear as there is currently no case law to guide decision-making and application of its provisions. This Act merits close examination as it is the most comprehensive law globally aimed at enforcing corporate responsibility and requires companies of a defined size to create plans to anticipate and mitigate risk to human and environmental rights. Companies that violate the law by failing to address risk through a comprehensive plan may face stiff penalties and can be brought to court by 'interested parties' in French courts. The Act allows for those facing risk of harm or those acting on their behalf, including NGOs, to bring claims within France's judicial system, which is arguably significant in countries with weak enforcement or legal capacity. The first lawsuit under the Act was brought against French-based Total by a consortium of French and Ugandan NGOs over the company's alleged failure to adequately address risk to human and environmental rights in Uganda. However, while the case remains pending in the French court system, there are several opportunities to learn from analysis of this case and its significance in a global context. This perspective article discusses the current case and analyses the potential gaps and opportunities of application of the law. Further, this research considers the role of the French law as a model for other countries that are aiming to develop similar legislation or extend the reach of their own 'due diligence' frameworks.

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In 2017, France legislated a prohibition on domestic hydrocarbon exploration and production by 2040, in line with national carbon emissions reduction goals. As the law applies only to France or French territories, there is argued incentive for French-based companies to move their extractive activities abroad. France also passed in 2017 a remarkable 'due diligence' law—the Duty of Care Act—that holds large French companies responsible for impacts of their activities worldwide, including subsidiaries and the totality of their supply chains. The law's potential reach is unclear as there is currently no case law to guide decision-making and application of its provisions. This Act merits close examination as it is the most comprehensive law globally aimed at enforcing corporate responsibility and requires companies of a defined size to create plans to anticipate and mitigate risk to human and environmental rights. Companies that violate the law by failing to address risk through a comprehensive plan may face stiff penalties and can be brought to court by 'interested parties' in French courts. The Act allows for those facing risk of harm or those acting on their behalf, including NGOs, to bring claims within France's judicial system, which is arguably significant in countries with weak enforcement or legal capacity. The first lawsuit under the Act was brought against French-based Total by a consortium of French and Ugandan NGOs over the company's alleged failure to adequately address risk to human and environmental rights in Uganda. However, while the case remains pending in the French court system, there are several opportunities to learn from analysis of this case and its significance in a global context. This perspective article discusses the current case and analyses the potential gaps and opportunities of application of the law. Further, this research considers the role of the French law as a model for other countries that are aiming to develop similar legislation or extend the reach of their own 'due diligence' frameworks.

Introduction

In 2017, France passed a law (loi n° 2017-1839) to end all fossil fuel exploration or production by 2040 [1]. Under the legislation, current drilling permits will not be renewed, and no new licenses will be granted within France or territories [2]. The reach of this Prohibition Act, however, is limited as it does not apply to activities of French-owned or French-chartered companies operating *elsewhere*, or French companies that contract to import hydrocarbons from outside France for domestic use. It is unlikely that the ban will be rescinded, as hydrocarbon extraction of shale-embedded sources in France requires well stimulation methods such as hydraulic fracturing that have been prohibited since 2011 [3,4]. Thus, there is the arguable incentive for developers of extractive resources forbidden from operating within France to move their operations abroad, including countries in the Global South such as Uganda, where there may be less regulatory oversight and fewer legal impediments [5,6][1].

[1]Uganda ranked 117 of 128 countries in the World Justice Project's Rule of Law index, based on 8 factors: constraints on government powers 105/128; absence of corruption, 125/128; open government 102/128; fundamental rights 117/128; order and security 113/128; regulatory enforcement 106/128; civil justice 108/128; criminal justice 113/128. See World Justice Project, 2020.

France also passed in 2017 a groundbreaking law on *due diligence* in business practices—the *devoir de vigilance* or Duty of Care Act (loi n° 2017-399)—that holds large French-based corporations responsible for the human rights and environmental impacts of their world-wide activities, including those of subsidiaries and throughout the entirety of their supply chain [7]. As this Act is so recent, there are as yet no legal precedents, and it is unclear how the Act will be interpreted and applied. The first lawsuit brought under the Act was filed by a consortium of French and Ugandan NGOs[2] in October 2019 against French-based Total S.A., alleging inadequacies of their Plan to protect local communities from risk of proposed oil extraction operations in the Lake Albert region of Uganda, and construction of a pipeline to bring oil to the Tanzanian coast for export [8,9,10]. This ongoing case is being followed with considerable interest. The preliminary decision of the Judicial Tribunal in Nanterre, France in January 2020 only stated that the Tribunal was not the proper legal venue and did not address the human rights merits of the case [11]. The suit was argued before France's Court of Appeals in Versailles on October 28, 2020. The Appellate Court's decision, announced on December 10, 2020, upheld the earlier ruling in favour of Total—again refusing to consider the human and environmental merits argued in the case—and remanded the case to the French Commercial Court [12,13].

This perspective article discusses lessons that can be drawn from these preliminary rulings and potential application of the Act to protect communities beyond French borders from environmental and human rights impacts of business activities of large corporations. The situation of Uganda forms the focus of this research, as an example of potential human and environmental rights violations and an area of potential application of the new law. Additionally, argued weaknesses and ambiguities in how the Act was drafted—and impact on court decisions to date—are highlighted. While it is not yet clear how the law will be interpreted by French courts, this discussion is timely as other countries, including Switzerland and Germany, are following the case with interest, as they consider how to draft their own legislation to hold businesses accountable for global activities [14].

Background to the French Duty of Care Act

Well-documented global examples illustrate companies that lose ability to operate in their home countries due to environmental or health risks—or who lose market profitability as consumers stop buying products—but then move their operations abroad, to benefit from weaker environmental or human rights oversight. Examples include Nestle's controversial marketing of infant formula, Coca-Cola and other companies selling sugar-heavy drinks, tobacco companies, pesticide and chemical manufacturers marketing to developing countries [15,16,17,18].

There has been increasing concern over European and American companies outsourcing manufacturing to factories in countries with less-developed safety and environmental regulations, and weak governmental and regulatory oversight [19,20,21,22]. While France had previously debated a law to impose responsibility on corporations for their global activities, passage had not moved forward [23]. In 2013 a catastrophic fire swept through a garment factory

[2]Plaintiffs included: Friends of the Earth France; Survie; the Africa Institute for Energy Governance (AFIEGO) in Uganda; Civic Response on Environment and Development (CRED) in Uganda; National Association of Professional Environmentalists (NAPE)/Friends of the Earth Uganda; and Navigators of Development Association (NAVODA)

in Bangladesh followed a few months later by the collapse of a large building housing manufacturing companies [24,25,26,27]. These tragedies, in which over a thousand were killed and 2700 injured, focused attention on the fact that well-known textile brands—including French-based Auchan, Tex, Camaïeu, and others—were being produced in factories overseas, which employed cheap labour working under dangerous conditions that would arguably not have been tolerated in France [24,28,29]. The Bangladesh disasters highlighted the need for a 'supply chain law' that would hold large multi-national firms accountable—not only for their actions at home, but in other countries as well, and further hold them responsible for the business practices of subsidiaries, affiliates, suppliers and partners [24,30].

The French Duty of Care Act's draft version (sometimes referred to as the 'Rana Plaza Law,' after the building that collapsed in Bangladesh), was introduced in November 2013, followed by rounds of modifications and compromises until it was approved by France's Parliament in February 2017 [7,10,24]. The Act faced opposition from the business community and took four years to revise and pass, but the resulting law has been called a collaboration between "civil society organizations, trade unions, academics, lawyers and Members of Parliament" [23,31, p. 317]. It was quickly challenged on grounds of 'constitutionality,' but its validity was substantially upheld [31]. The exception was that the provision for a judge-imposed civil fine—potentially up to 10 million euros and thus designed to be punitive—was determined to violate the French Constitution [31,32]. The language was stated by the court to be overly broad with concepts such as "human rights" and "fundamental freedoms" not substantively defined, meaning that the fines would violate "the principle of no punishment without law" [33, Art. 1,34]. The result of the Court's ruling upholding the Act was that 'interested' parties—loosely defined and including members of communities affected by corporate action and NGOs—now had constitutional grounds for demanding legal recourse in the event of harm [24,31,34,35].

The constitutional confirmation of the Duty of Care Act represents an important step toward developing the legal means to hold large corporations accountable for risk to environmental and human rights of their global activities and is of interest to other countries and international bodies seeking to develop approaches to corporate due diligence [5,10,23,24,31,36]. The Act's aim is to provide a legal obligation for companies to exercise "…reasonable vigilance measures to adequately identify risks and prevent serious violations of human rights and fundamental freedoms, risks and serious harm to health and safety and the environment…" [7, Art. 1]. Moreover, anyone with a claim against a French-owned or French-based company meeting standards of size has the right to bring suit within the French justice system, even if the operations and risk are outside France. Article 1 of the French Duty of Care Act inserts Article L. 225-102-4 within the French Commercial Code, as the Act governs *business or commercial* activities [7,24,37]. This Article legislates the responsibility of French corporations in all their worldwide activities:

> "*Any company, which at the end of 2 consecutive years, has at least 5000 employees itself and in its direct or indirect subsidiaries where the registered office is in French territories, or at least 10000 employees itself and in its direct or indirect subsidiaries, where the registered office is in French territory or abroad, should establish and effectively implement a plan of vigilance"* [37].

Companies fitting these criteria are mandated to develop and publicize a Plan of Care that anticipates and acknowledges the potential risk to human and environmental rights of their operations and identifies steps taken to avoid or mitigate risk [7,24,31]. The UK's Modern Slavery Act of 2015 and California's Transparency in Supply Chains Act of 2010—precedents to the French law—both aim to ensure that corporations move to eradicate human slavery and trafficking withing their full supply chains [38,39,40,41,42,43]. The French Act goes considerably farther, however, as it provides meaningful penalties for potential violations includes environmental risk along with human rights risks [10,24].

The Act describes the requirements of the Plan:

> *"The plan establishes reasonable due diligence measures to identify risks and prevent serious violations of human rights and fundamental freedoms, health and safety and the environment resulting from activities of the company or the companies under their control, or from the activities of their subcontractors and suppliers with whom they have an established business relationship"* [7].

The following five elements are required to be included in the Plan [7].

Plan to Address Risk of Global Business—

Loi n° 2017-399, Art L. 225-102-4

- a risk mapping aimed at identifying, analysing and classifying such risks;
- procedures for regular evaluation of the situation of subsidiaries, as subcontractors and suppliers;
- appropriate actions in order to mitigate the risks and prevent serious harm;
- a warning mechanism and a compilation of all the reports/alerts related to the existence and materialization of such risks, such documents being prepared in cooperation with the representative unions of the company;
- a mechanism for monitoring the measures taken and an evaluation of their efficiency.

Additionally, Article 1 of the Act states that the plans "...are intended to be developed in association with stakeholders..." [7].

The failure to develop or implement a plan, or if a plan is determined to be inadequate, can leave the company open to liability and an action to force responsibility can be introduced "... before the competent court by any person who has an interest in acting for this purpose" [7, Art. 2,33]. If the complaint is not answered within three months, a party can bring suit within a French court of law; a court can order the company to comply with its obligations and levy penalties, accrued daily; and the company can face civil liabilities in case of damages to a third party [7].

The international basis for France's Duty of Care Act is situated within the UN's Guiding Principles of Business and Human Rights [44], which provides a global framework for preventing harmful impacts on human rights linked to business operations [11,45,46]. The Principles establish the responsibility of an enterprise to "…address adverse human rights impacts with which they are involved," including those caused indirectly, or caused by enterprises with which the business has a relationship [44, Prin. 11]. Principle 3 calls on states "[to] encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts" [44].

While the French Prohibition Act banning hydrocarbons by 2030 represented a positive step toward carbon neutrality, it is limited in reach as it only applies within French territory. This arguably may encourage French companies to move operations outside France, thus increasing potential risk of human and environmental harm in these locations. The Duty of Care Act addresses this issue by expanding the scope of responsibilities to other countries and providing judicial recourse. As there is as yet no case law and resolution of pending legal actions is not likely soon, this is a good opportunity to evaluate the strengths and weaknesses of the Act. The table below presents a brief SWOT summary—strengths, weaknesses, opportunities and threats—of the two laws, highlighting the potential gaps that may be filled as a result of robust application of the new Duty of Care Act.

Table 1. SWOT comparison of French hydrocarbons Prohibitions Law and Duty of Care Act

	Strengths	Weaknesses	Opportunities	Threats
Ban on Hydrocarbons Loi 2017-1839	Eliminates all domestic production of fossil fuels by 2030. Potential for decarbonisation of energy sector (climate leadership).	Largely *symbolic* as France does not produce significant quantities of fossil fuels. Does not lead France meaningfully toward climate goals. Does not impede fossil fuel importation from outside France.	Serves as potential model for fossil fuel bans in other countries. Incentive for implementation of non-fossil fuel energy sources.	May encourage French companies to develop fossils in countries with greater economic or political instability, leading to post-colonial NIMBYism
Duty of Care Act 2017-399	Increases scope of corporate responsibility beyond national (French) borders. Requires evaluation/	Currently no case law or legal precedents, meaning interpretation is unknown.	Opportunity for implementation/ evaluation of entire supply chain life cycle assessment (LCA) analyses.	Current absence of judicial accountability or jurisprudence. Failure to pass into law, or vetoing, similar proposals (i.e.,

	assessment of entire supply chain. Requires implementation of human rights *and* environmental protections at all stages of supply chain. NGOs and local actors can access French legal system for potential redress.	Act only applies to large companies. There is no standardization among plans of actions, leading to wide variability. Law contains imprecise language, i.e., 'reasonableness'. May lack capacity for enforcement or penalties may be too weak.	Potential model for other countries/ international law.	Switzerland, Germany). Included in French *Commercial Code* with first case sent back to Commercial Court—meaning that it is unclear how courts will adjudicate human and environmental rights risk within business context.

Uganda Energy Context

Uganda's involvement in the extraction of hydrocarbons is relatively recent, dating to 2006 when significant reserves of oil were discovered on the shores of Lake Albert [47,48,49]. Development of these resources has been slow, however, in part because of disputes between the government and potential international investors as Uganda's priority has been to strengthen the State's potential income through pro-national regulation and tax structures; disputes over the route of the pipeline created further delays [50,51]. The UK's Tullow Oil Company initially had signed a memorandum of agreement with Total and China National Offshore Oil Corporation (CNOOC), to develop a major drilling site, build a refinery complex and construct a pipeline to the Tanzanian shore, as Uganda has no direct sea access [52]. Tullow Oil has recently sold its stake to Total, making the French multinational the major stakeholder [53]. In September 2020, Total signed an agreement with the government to construct the pipeline [54]. Development of Uganda's hydrocarbons now seems on track to move forward. Announcing the agreement with Total, Uganda President Yoweri Museveni expressed support for the project, saying "our oil will be used to develop our infrastructure and ICT [information and telecommunications] ...and [Total is taking] bold steps to quickly commence the production of petroleum [53,54].

The government supports the project to develop oil fields and build the pipeline, which is expected to create needed jobs and improve access to electricity, as much of Uganda's population currently lacks modern dependable energy—with uncertainty about the impact of the Covid-19 pandemic on progress [54,55] As Uganda is currently classified by the UN as a "least developed country," the government expects that the planned large-scale energy project will improve the country's economic position [56]. Total estimates that 6,000 direct or indirect jobs could be created by the Tilenga oil extraction project, with Hon. Mary Goretti Kitutu, Uganda's Energy Minister, projecting that the pipeline will create 10,000 jobs [57,58].

Uganda law covering environment, human rights and land rights

Environmental, human rights and land protections are enshrined in Uganda's 1995 Constitution. Under Article 245 the government mandate is "to protect and preserve the environment from abuse, pollution and degradation; (b) to manage the environment for sustainable development; and (c) to promote environmental awareness" [59]. Moreover, section XXVII states:

> (i) The State shall promote sustainable development and public awareness of the need to manage land, air, water resources in a balanced and sustainable manner for the present and future generations.
> (ii) The utilization of the natural resources of Uganda shall be managed in such a way as to meet the development and environmental needs of present and future generations of Ugandans; and in particular, the State shall take all possible measures to prevent or minimise damage and destruction to land, air and water resources resulting from pollution or other causes.
> (iii) The State shall promote and implement energy policies that will ensure that people's basic needs and those of environmental preservation are met.
> (iv) The State, including local governments, shall-
> (a) create and develop parks, reserves and recreation areas and ensure the conservation of natural resources;
> (b) promote the rational use of natural resources so as to safeguard and protect the bio-diversity of Uganda" [59].

The Constitution additionally identifies cultural aims, including the provision that "[t]he State shall promote and preserve those cultural values and practices which enhance the dignity and well-being of Ugandans" [59].

The Ugandan Constitution provides the underpinnings for environmental and other laws. The National Environmental Action Plan (NEAP) is designed to manage the environment and promote sustainable economic development for current and future populations. Within this framework are a series of environmental policies that address forestry, wetlands management, wildlife management, the Environment Act, and more. While Uganda has a robust framework of environmental policies, the enforcement arm arguably lacks capacity–both in terms of enforcement agents and understanding of environmental law and management [60,61]. Kassim [62] says that Uganda needs not only laws, but "...willingness and commitment from government and other officials." While the Uganda government has put into place a fairly elaborate set of policies, as well as the legal and institutional mechanisms to address environmental concerns, the government largely lacks the capacity to implement these policies and laws and ambiguity in policies leads to conflicting interpretations and weakening of protections, and further arguably lacks proper budget allocated to environmental legal enforcement [61,63,64]. An environmental impact assessment process is part of Uganda's legislative framework, but there is evidence of continued environmental degradation (which would arguably be worse without an EIA) exacerbated by such issues as transboundary nature of projects, lack of community participation, lack of transparency, lack of scientific capacity, and more [65].

Protection of rights to land ownership has had a long and contentious history in Uganda, owing to the country's colonial legacy and lack of legal mechanisms for settling disputes [66]. The Land Act of 2013 is an attempt to unify land policy, recognizing that provisions related to land in the Constitution are not adequate, and acknowledging problems related to population growth, land speculation, loss of ancestral lands among certain communities, illegal evictions, and more [66]. The Act includes the aim to "[r]edress historical injustices to protect the land rights of groups and communities marginalized by history or on the basis of gender, religion, ethnicity and other forms of vulnerability to achieve balanced growth and social equity" [66].

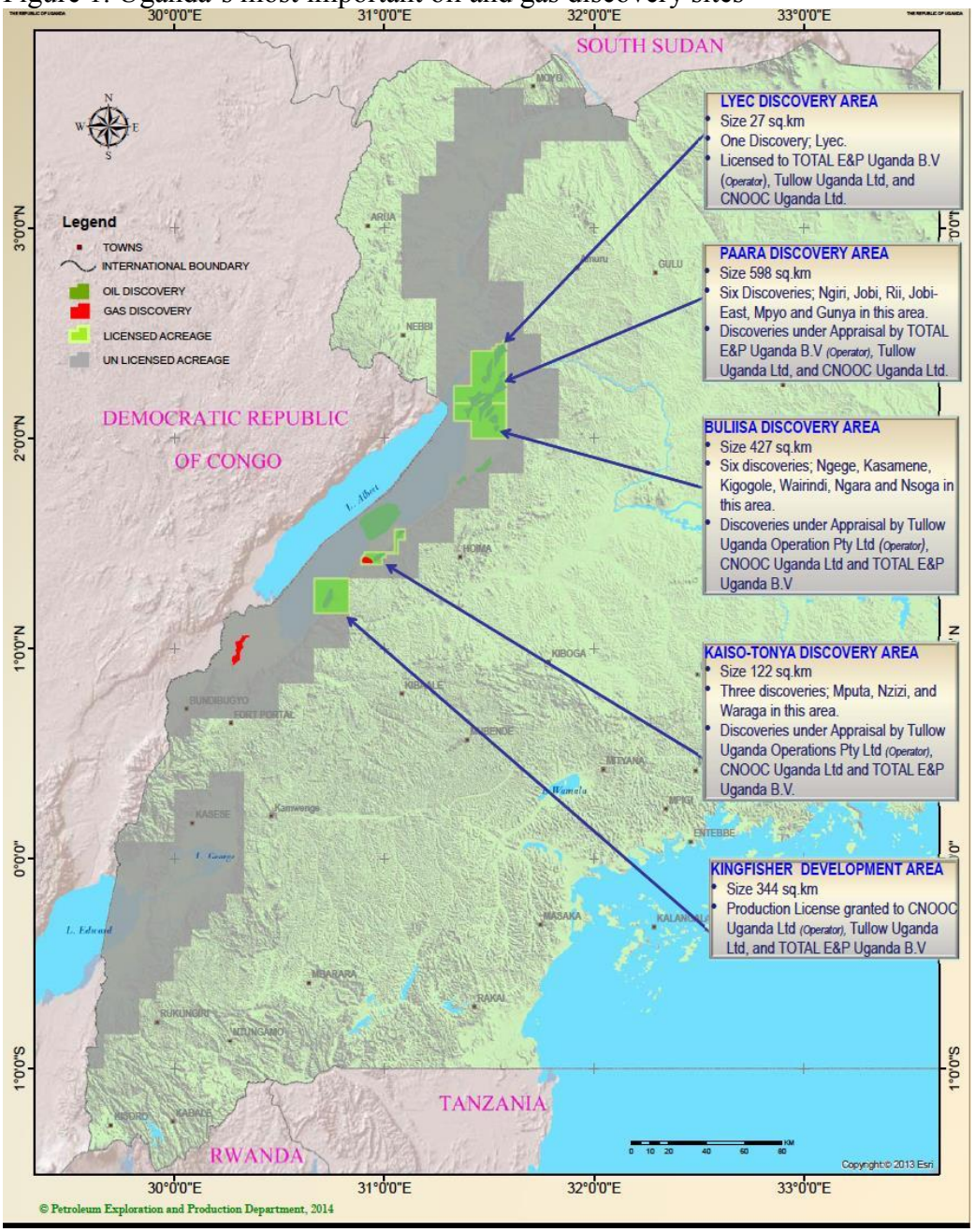
The Petroleum Act of 2013 is the legal instrument that regulates petroleum exploration and production and under its provisions has established a National Oil Company [66]. In August 2020, Uganda joined the Extractive Industries Transparency Initiative (EITI), with the goal of creating enduring benefit from the nascent petroleum development as well as encouraging a climate of trust with stakeholders and investors [67].

Proposed development: Tilenga oil project and East African crude oil pipeline

The two major projected hydrocarbon projects in Uganda are both led by French-based Total S.A.—the fifth largest oil and gas producing company in the world, with 100,000 employees operating in more than 130 countries [68]. Total is thus required under the Duty of Care Act to produce a comprehensive Plan of Care that identifies the potential environmental and human rights risks and how the company plans to address those risks in concrete terms [9,69]. The Tilenga development, which is projected to include six oil fields with over 400 wells, a refinery complex that will allow oil to be partially processed near where it is extracted as well as networks of pipelines, is located in Western Uganda, in the Lake Albert region of the Albertine Graben, partially within the protected Murchison Falls National Park (Figure 1) [62,70,71]. The Albertine Graben is an important biodiversity 'hotspot' and contains wildlife, water and environmental resources of value both economically and socially and has 10 of Uganda's 39 wildlife protected areas [62,72]. An environmental and social impact assessment (ESIA) determined that 80% of the households in the projected development had livelihoods based on agriculture, either crops or livestock, as well as fishing, with some income provided through tourism [73]. An analysis of the ESIA by the Netherlands Commission of Environmental Assessment highlighted the value of tourism in the Murchison Falls National Parks saying that the "...economic value of tourism in MFNP may outweigh the value of oil production in the Park" [71]. The Uganda government says that about 2400 acres will be developed, requiring land acquisition in phases [70].

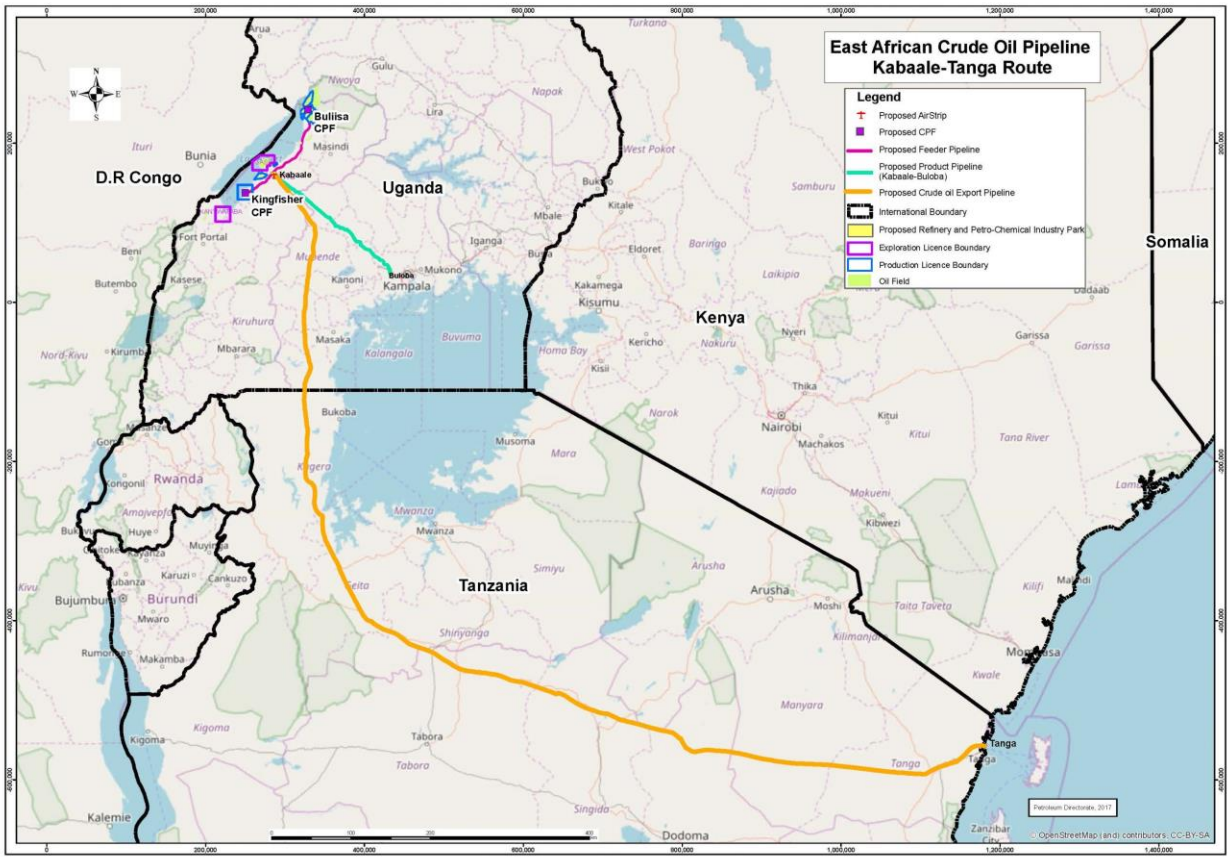
The second project is the East African Crude Oil Pipeline (EACOP), a 1440 kilometre heated pipeline to bring oil from a pumping station in Uganda to Tanga, Tanzania, for transport by sea, as Uganda is landlocked (Figure 2) [74,75]. This project will include infrastructure such as new or redeveloped roads, construction sites, pumping stations, and more [75]. The route includes wetlands and important rivers, regions of significant biodiversity, including forest reserves and animal migratory crossings. Additionally, there are human populations—predominantly depending on agriculture for livelihoods—and as the route passes through three kingdoms, there are potential complications with respect to land ownership and compensation rights [75].

Figure 1. Uganda's most important oil and gas discovery sites



Source: Uganda Ministry of Energy, as reproduced by Oxford Institute for Energy Studies, p. 10

Figure 2. Proposed East African Crude Oil Pipeline



Source: Petroleum Authority of Uganda

Potential risks to environment in area of Uganda's proposed hydrocarbons development

There is arguable considerable risk in both projects of human rights violations to local populations, as well as potential for risk to fragile ecosystems [74,76]. The 2014 Uganda Government Report on the National State of the Environment [77, p. 120] highlighted the risk of biodiversity loss, pressure on forest and other resources from petroleum development, loss of communal land to "speculators," wildlife impacts, and more**.** The Albertine Graben is recognized as an environmentally vulnerable region of rich biodiversity and eco-tourism [62,72,78]. The drilling and transport project is situated in part within Lake Albert Murchison Falls National Park, a protected area of wildlife and biodiversity, that is home to culturally diverse indigenous populations being displaced and impacted by the two projects [79]. It has been argued that the National Environment Management Authority (NEMA) lacks technical and staffing capacity and does not have needed water and soil quality standards in place; additionally, ambiguity in policies may negatively impact implementation of protective laws and policies [61,78]. In household surveys conducted in 2014—even before production in the area had begun—respondents reported environmental impacts, including to national parks, noise pollution, water bodies, air pollution and forests [78]. Respondents moreover reported expected future significant negative impacts, including migrants moving into their communities, land disputes, increasing income inequality, elevated levels of pollution, and more [78].

While significant environmental and social protections are included in the country's Constitution, Uganda arguably lacks the enforcement and legal mechanisms to protect the vulnerable ecosystems and well-being of local populations, and the oil and gas sectors and the government have not provided adequate information on resettlement or compensation plans [65,74,80,81]. Reports released in September 2020 by NGOs Oxfam and the Fédération internationale pour les droits humains (FIDH) highlight the potential risks to communities in the area of the proposed development—many of whom will need to be relocated [74,76]. The Oxfam study found that "[T]here was also general confusion between the two types of offered compensation in almost every village where data was collected, a signal that the community engagement and information sharing by Total/EACOP or its subcontractors has not been effective" [74].

Total first produced a Plan of Care in 2017, modified in 2018 and again in 2019, which it made public as required under the Act through its corporate website [9,82]. Total's Plan of Care is a document of *general* principles and procedures, that does not address the specific risks and requirements of the community or environment of projected developments, such as Uganda and its unique environmental and social risks [83]. Total has argued that a company is required *only* to address general risks, contending that "[t]he French Law on Corporate Duty of Care takes a general approach by type of risk. It does not require disclosure of risks specific to individual projects" [82].

Current status and potential application of the Duty of Care Act

The decision to use the French Duty of Care Act to control impacts of the activities was based on the argument that the legal system in France is more robust. According to Dickens Kamugisha, director of the Kampala-based Africa Institute for Energy Governance, "[w]e believe that the justice system in France is much more strong and independent" [8]. NGOs may play demonstrated roles in environmental protection, particularly when governance mechanisms are not adequate [84,85,86]. Importantly, the reach of the French Duty of Care Act provides for NGOs or others to initiate actions, extending the reach and potential benefit of these organizations in providing assistance (including access to information and legal aid) to communities in environmental or human rights remedies [5,24].

In 2019, a group of six NGOs based in France and Uganda joined together to initiate legal action in France against Total alleging human rights violations over its operations in Uganda—the first application of the 2017 Duty of Care Act [87]. On June 24, 2019, the NGO's filed a formal notice to Total to amend its care plan, citing the plan's inadequacy to address human rights risks of its operations in Uganda [82]. When the end of the 3-month legally established deadline for compliance passed, Total rejected the claim of inadequacy; the NGOs then filed suit on October 23 in Nanterre, France, to force compliance by explicitly addressing the human and environmental rights risks of the Uganda operations [8, 88,89]. This suit contended that Total had not fully met its responsibilities to produce and develop a comprehensive Plan of Care [9,89]. The plaintiffs argued that the published plan violated French law as it did not address the risks or measures *specific* to Total's activities in Uganda related to Tilenga and EACOP or include measures to implement the plan to mitigate risk [89]. Total refuted the charges, arguing in part that "[t]he French Law on Corporate Duty of Care takes a general approach by type of

risk. It does not require disclosure of risks specific to individual projects" [82]. Despite Total's three published Care Plans, the argument levelled against Total was that the identification of risk was still inadequate as it was "generic," and "neither analysed nor ranked as explicitly required by the law" [89].

In this first legal case brought under the Duty of Care Act, the High Court of Justice in Nanterre ruled itself "incompetent" to hear the case, meaning that it determined itself to be the incorrect venue and remanding the case to the Commercial Court, accepting Total's argument that the Plan of Care was by definition a "management report" and the case was thus a 'business dispute' [5,11,89,90,91,92,93]. The plaintiffs argued that this decision did not address the issue of prevention of harm that was the purpose of their suit and the intention of the Act [92]. Additionally, there is the argument that the Commercial Court is designed to adjudicate cases between commercial entities and those who hear these cases are business leaders rather than "professional judges," thus lacking the capacity to rule human rights issues [92,94].

The NGOs appealed the decision to the Appellate Court in Versailles, with the decision announced on December 10, 2020, upholding the lower court's judgment to remand the case to the Commercial Court. The Appellate Court, too, refused to rule on the "merits of the case" [95]. The NGOs have argued that this ruling is against "the spirit of the duty of vigilance law and will of the legislators" as the purpose of the law is to protect communities and hold companies responsible for actions of third parties and is not, therefore, purely a "commercial dispute," [95] arguably a crucial missed opportunity for protecting human rights, environmental quality, and climate impacts [13].

Recently, the UN special Rapporteurs have expressed concern about potential human rights violations as a result of the suit itself, as witnesses appearing in the Tribunal's proceedings in France have arguably faced harassment—charges that Total has denied [96].

Conclusion

As of this writing, the outcome of Total's case has not yet been decided. There are important questions, however, about potential future application of the French Duty of Care Act. The SWOT summary presented in Table 1 highlighted argued inadequacies in the drafting of Act. A study by a consortium of NGOs of fifty selected plans developed in 2018 identified a number of gaps, including that many plans were "evasive" and "too generic," and inconsistently developed, concluding that "companies must do better" [69,97, p.10 & 42]. Additionally, companies are required to undertake "reasonable due diligence measures" but it is unclear how "reasonableness" is defined and measured [98, p. 53]. Other weaknesses include that the reach of the law is limited to very large corporations and that the originally included strong punitive fine—deemed unconstitutional—may be needed to enforce compliance by companies [98]. Moreover, the very fact that the Act is situated in the French Commercial Code makes unclear how it will be meaningfully applied to human and environmental rights.

On the other hand, while the application of the law may have some potential weaknesses, the Duty of Care Act represents an important step forward to hold large French corporations accountable for their environmental and climate change, and human rights, impacts [24,31]. The

Uganda case, while current decisions have as yet not addressed the human and environmental rights issues, has forced Total to amend its plan of care—thus focusing attention on their operations and putting them under international scrutiny. Additionally, the law has given local communities a way to address grievances that they arguably would have otherwise lacked, particularly where there are threats to local actors presenting claims [9,89,99]. A recent case, also pending within the French court system, brought by a group of NGOs and French municipalities alleges that Total has not addressed climate change risk in its Plan of Care [100].

At the same time that the case against Total is ongoing, there is also a movement to develop mechanisms to protect against risk of environmental and human rights violations within corporate supply chains in international and national contexts [10,101]. As an example, the Human Rights Council of the UN is developing a binding international treaty on business activities and human rights, with comments due on the most recent draft report by February 2021 [102]. Other movements to enact legislation on corporate responsibility are ongoing in Europe, including Switzerland, which recently conducted a public referendum on a law on human rights and environmental rights of corporate activities at home and abroad [36,101,103,104]. Unlike the French law that is limited to very large entities, the Swiss proposal also included small and medium-sized companies [46]. While the proposal received a majority of the popular vote, it was defeated as it did not receive a majority of canton votes, as required in order to pass [103]. A weaker law will automatically take effect [103,105,106]. Germany is also considering supply chain legislation, in line with recent recommendations from a study released by the European Union [104,107]. Thus, there is an arguable global movement for the protections such legislation at national and international levels can provide [101,107].

Importantly, moving forward, the decisions made in the groundbreaking French cases will set significant legal precedents and provide opportunities for legal recourse that combine environmental and climate protections with preservation of human rights. Moreover, these legal decisions and regulatory developments—including argued weaknesses in the law, as highlighted in unfolding court decisions—can influence other countries as they develop their own novel regulatory frameworks to expand corporate environmental, social and human rights responsibility beyond their national borders.

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