IMAGE BY JULIETTE RENAUD

LEGAL ANALYSIS

COULD A UN TREATY MAKE TRANSNATIONAL CORPORATIONS ACCOUNTABLE?

THE CASE OF TOTAL'S TILENGA AND EACOP OIL PROJECTS

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ACRONYMS

EACOP
East African Crude Oil Pipeline

UNOC
Uganda National Oil Company

LARF
Land Acquisition and Resettlement Framework

RAP
Resettlement Action Plan

ESIA
Environmental and Social Impact Assessment

NEMA
Uganda’s National Environment Management Authority

CPF
Central Processing Facility

CNOOC
China National Offshore Oil Corporation

ESIA
Environmental and Social Impact Assessment

HRD
Human Rights Defenders

LESSONS FROM TOTAL'S TILENGA AND EACOP OIL PROJECTS FOR A STRENGTHENED TREATY ON TNCS AND OTHER BUSINESS ENTERPRISES WITH RESPECT TO HUMAN RIGHTS

1. CASE

THE TILENGA AND EACOP OIL PROJECTS AND THEIR SURROUNDING AREA

The Tilenga oil project is part of a major oil development venture on the shores of Lake Albert in West Uganda. The entire development comprises several oilfields on the north and south of the lake and associated infrastructure including an industrial zone with an oil processing plant (Central Processing Facility or "CPF") in Buliisa district [1] and a refinery in Kabaale, in Hoima district (to be constructed by the Ugandan government). [2] From the refinery, the oil will be transported for export to the port of Tanga in Tanzania, through a 1,443 km-long pipeline (the "East African Crude Oil Pipeline" or "EACOP").

The oilfields will be developed and exploited by a joint venture comprising Total Exploration & Production Uganda B.V (from now on, "Total Uganda"), a wholly-owned subsidiary of French oil giant TotalEnergies S.E. (from now on "Total"), and China National Offshore Oil Corporation Uganda Ltd. (from now on, "CNOOC"), a wholly-owned subsidiary of China National Offshore Oil Corporation Ltd.[3] They own, respectively, 66.66% and 33.33% stake in the project (a share which will be reduced proportionately once Uganda National Oil Company (UNOC) acquires a 15% interest).[4] Before selling its 33.33% share in the project to Total in November 2020, UK-based Tullow Oil plc was the third partner in the joint venture.[5] Total Uganda will operate the Tilenga Project in Buliisa and Nwoya districts on the north of the lake, while CNOOC will operate the Kingfisher fields in Kikuube district on the south.[6] EACOP will be constructed by a consortium led by Total East Africa Midstream, another wholly-owned subsidiary of TotalEnergies S.E.[7] This case study will focus primarily on Total's Tilenga project. [8] Although not detailed in the present report, these projects also present serious risks of irreversible harm to the environment and the climate.[9]

Exploration work has now culminated and the companies are awaiting the completion of a series of agreements that will lead to the "Final Investment Decision" to begin construction work.[10] First oil production is currently expected in 2025.[11]

Lake Albert sits at the border between Uganda and the Democratic Republic of Congo. The land surrounding the

1 | Friends of the Earth France and Survie, 'Serious Breaches of the Duty of Vigilance Law: the Case of Total in Uganda', June 2019, (from now on, "The Case of Total in Uganda"), p 7, https://www.albertinewatchdog.org/wp-content/uploads/2020/01/serious-breaches-of-the-duty-of-vigilance-law-the-case-of-total-in-Uganda.pdf See also International Federation for Human Rights (FIDH) and Foundation for Human Rights Initiative (FHRI): New Oil, Same Business? At a Crossroads to Avert Catastrophe in Uganda Community-Based Human Rights Impact Assessment of the Lake Albert Oil Extraction Project and Related Developments in the Albertine Graben, Uganda, September 2020, (from now on "New Oil, Same Business?"), p 6, https://www.fidh.org/IMG/pdf/new_oil_same_business-2.pdf

2 | https://www.unoc.co.ug/kabaale-industrial-park-kip/

3 | China National Offshore Oil Company Ltd is ultimately owned by the Chinese State.

4 | Total, Universal Registration Document 2020, p 220, https://www.total.com/system/files/documents/2021-03/2020-universal-registration-document.pdf

5 | Tullow Oil, 'Tullow completes $575 million sale of Uganda assets to Total', 10 November 2020, https://www.tullowoil.com/media/press-releases/tullow-completes-575-million-sale-uganda-assets-total/

6 | Total: https://ug.total.com/total-uganda CNOOC: https://cnoocinternational.com/operations/middle-east-and-africa/uganda

7 | Total owns 66,67% share in this project. EACOP: https://eacop.com/about-us/overview/

8 | For a comprehensive account of human rights concerns around the oil pipeline, see Oxfam et al, 'Empty Promises down the Line? A Human Rights Impact Assessment of the East African Crude Oil Pipeline', September 2020, https://oxfamilibrary.openrepository.com/bitstream/handle/10546/621045/rr-empty-promises-down-line-101020-en.pdf?sequence=1&isAllowed=y

9 | For more information on environmental and climate impacts, see The Case of Total in Uganda, pp.28-35, A Nightmare named Total , pp. 23-26, and Friends of the Earth USA"World Heritage Forever? How Banks Can Protect the World's Most Iconic Cultural and Natural Sites", August 2021, pp. 37-40. https://foe.org/resources/world-heritage-forever-how-banks-can-protect-the-worlds-most-iconic-cultural-and-natural-sites/ ; and The East African Crude Oil Pipeline – EACOP a spatial risk perspective, Stockholm environmental institute, https://mapforenvironment.org/story/The-East-African-Crude-Oil-Pipeline-EACOP-a-spatial-risk-perspective/111

10 | Fred Ojambo and Paul Burkhardt, 'Total Signs Agreements with Uganda on East Africa Oil Project', Bloomberg, 11 April 2021, https://www.bloomberg.com/news/articles/2021-04-11/total-signs-agreements-with-uganda-on-east-africa-oil-project

11 | https://twitter.com/UNOC_UG/status/1419897282623950857?s=20

lake is extremely rich in biodiversity and the north part of the lake, on the Ugandan side, is designated as a protected area.[12] Many communities live on this land, which they use for farming, grazing and natural-resource harvesting. They hold the land mostly under unregistered customary tenure, either individually or collectively (by a family, clan, or community), though clan-based tenure is the predominant form. [13]

LARGE-SCALE LAND ACQUISITION: THE LEGAL FRAMEWORK

The oil companies estimate that approximately 1,576 hectares of land will be required for the Tilenga Project.[14] According to Total's own figures, Tilenga will cause the displacement of almost 5,000 households, amounting to more than 31,000 individuals, mainly from Buliisa District, where nearly 27% of the population is affected by the land acquisition process. [15] Additionally, EACOP will affect the land of around 13,000 households in Uganda and Tanzania, corresponding to around 86,000 people.[16] Uganda's Constitution allows for compulsory taking of property when this is necessary for public use and sets conditions for a fair process, including prompt payment of fair and adequate compensation prior to the compulsory acquisition. [17]

The joint venture partners, in collaboration with the Ugandan government, elaborated a Land Acquisition

IMAGE BY LAMBERT COLEMAN/ HANS LUCAS

and Resettlement Framework (LARF) to govern the land acquisition and resettlement process for all the oil projects. [18] LARF specifies that it follows national law as well as Performance Standards 5 (PS5) of the International Finance Corporation (IFC) on "Land Acquisition and Involuntary Resettlement". [19] Within the framework of the LARF, the oil companies (called "operators" in the LARF) must develop Resettlement Action Plans (RAPs) for specific project components. RAPs, which must be approved by the government, contain detail of the people and property that will be affected as well as compensation frameworks and procedures to mitigate and remediate losses. [20] Operators must also prepare an Environmental and Social Impact Assessment (ESIA) for each project component and submit it to Uganda's

12 | This comprises the Murchison Falls National Park within which there is a vast wetland protected under the Ramsar Convention. Tilenga Project, Environmental and Social Impact Assessment, Non-technical Summary, February 2019, p 8 (Section 1.2), https://www.total.com/sites/g/files/nytnzq111/files/documents/2021-03/Tilenga_esia_non-tech-summary_28-02-19.pdf Total plans to drill more than 400 wells, including more than 130 within the Murchison Fall National Park, the country's oldest national protected area. Friends of the Earth France and Survie, 'A Nightmare named Total - An Alarming Rise in Human Rights Violations in Uganda and Tanzania', October 2020 (from now on "A Nightmare named Total"), p 23, https://www.amisdelaterre.org/wp-content/uploads/2020/11/a-nightmare-named-total-oct2020-foe-france-survie.pdf

13 | New Oil, Same Business? p 7, 47.

14 | CNOOC, Total, Tullow, Tilenga Project Environmental and Social Impact Assessment, Volume IV, February 2019, Chapter 16, p 215, https://corporate.totalenergies.ug/sites/g/files/wompnd2271/f/atoms/files/tilenga_esia_volume_iv_28-02-19_reduced_size.pdf. Total also says on its website that about 6,400 hectares are concerned with land acquisition for the Tilenga and EACOP projects, see https://totalenergies.com/projects/oil-gas/tilenga-and-eacop-acting-transparently. However, in the same time, RAP 1 for Tilenga alone refers to a potential land take of 785 724 acres (317 971 ha), see p. 7. (https://www.scribd.com/document/411336100/Final-Tilenga-Project-Rap1-Report), showing that the company's statement should be approached with caution.

15 | Resettlement Action Plans (RAPs 2, 3a, 3b, 4 & 5) Executive Summary, September 2020, p 138.

16 | For detailed numbers and sources, see the compilation done by Friends of the Earth France in April 2021 on the basis of documents released by Total in January and March 2021 : https://www.amisdelaterre.org/wp-content/uploads/2021/04/20210407-numbers-of-individual-persons-affected-by-eacop.pdf

17 | Article 26, Constitution of the Republic of Uganda of 1995. These principles have been reaffirmed by numerous court rulings, including by the Supreme Court and the African Commission on Human and Peoples Rights. Friends of the Earth France and Survie, 'A Nightmare named Total , p 7.

18 | CNOOC, Total, Tullow, Land Acquisition and Resettlement Framework: Petroleum Development and Production in the Albertine Graben, December 2016, (from now on, "LARF"), https://ug.total.com/sites/g/files/wompnd1236/f/atoms/files/appendix_j_larf_tilenga.pdf

19 | LARF, p 2. IFC Performance Standard 5: Land Acquisition and Involuntary Resettlement, 1 January 2012, https://www.ifc.org/wps/wcm/connect/75de96d4-ed36-4bdb-8050-400be02bf2d9/PS5_English_2012.pdf?MOD=AJPERES&CVID=jqex59b

20 | LARF, p 85, 46.

21 | LARF, p 8, 47.

National Environment Management Authority (NEMA) for approval. [21]

Where project components require permanent land acquisition, operators must negotiate with landowners to facilitate the transfer of ownership to the government. The government then leases the land to the operators.[22] The valuation of property is carried out by private operators who prepare valuation assessment reports, which they then submit for approval to the government's Chief Government Valuer (CGV). [23] Under Ugandan law, compensation for land and other property is based on the principle of economic equivalence. Assets are valued strictly according to their market value.[24] Total Uganda subcontracted part of the land acquisition and resettlement programme for the Tilenga project to a company called Atacama Consulting Ltd. [25]

The LARF and IFC's PS5 set out a number of principles and standards for a transparent and participatory consultation processes regarding compensation.[26] These instruments also establish the principle of choice between compensation in kind ("land for land") and "cash compensation".[27] However, under PS5, compensation in kind must be prioritised over cash compensation, especially where affected people's livelihoods are land based or where they own the land collectively.[28] A paramount principle in both instruments is that compensation, in whatever form, must be prior and fair, that is, paid before residents lose their land and be sufficient to improve, or at least restore, affected people's standard of living. [29] LARF also requires that compensation packages be "culturally appropriate", of "equal or higher value, equivalent or better characteristics, and advantages of location" and "tailored to the specific characteristics of the project affected people". [30]

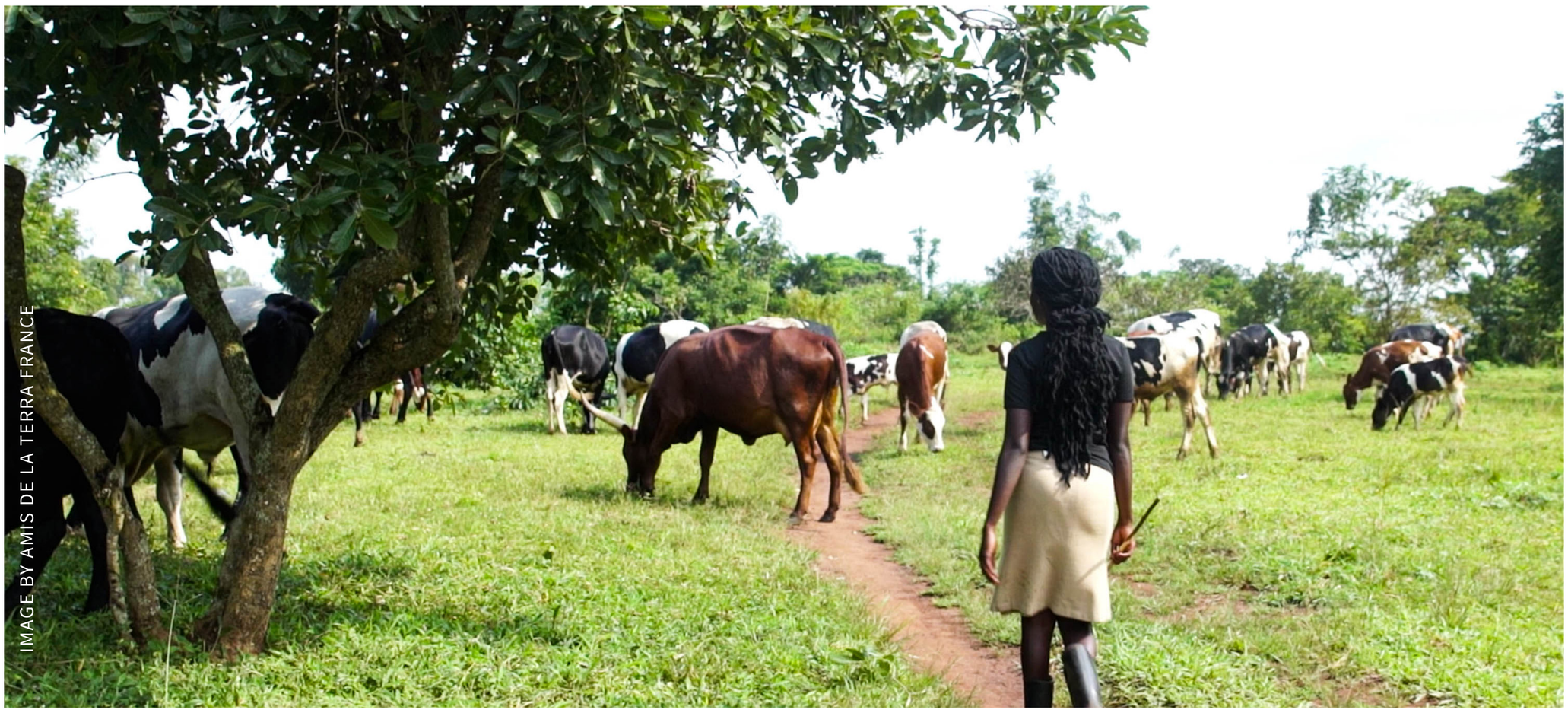

IMAGE BY AMIS DE LA TERRA FRANCE

22 | LARF, p 61.

23 | LARF, p 64-65.

24 | Chapter 227, Section 77, Land Act 1998. LARF, p 64.

25 | Rosa Luxemburg Stiftung, 'Preying on the Albertine – A Spotlight over Total E & P Operations in Uganda's Oil Region', https://www.rosalux.or.tz/preying-on-the-albertine-a-spotlight-over-total-ep-operations-in-ugandas-oil-region/#_ftnref13

26 | LARF establishes that "compensation frameworks must be developed in consultation with affected people and local authorities", p 64. The IFC PS5 states that "compensation standards must be transparent" (para 9) and requires disclosure of information and participation of communities "during the planning, implementation, monitoring, and evaluation of compensation payments, livelihood restoration activities, and resettlement" (para 10).

27 | LARF, p 66. IFC PS5, para 20.

28 | IFC PS5, para 9 and 21. PS5 also states that "If people living in the project area are required to move to another location, the client will (i) offer displaced persons choices among feasible resettlement options, including adequate replacement housing or cash compensation where appropriate; and (ii) provide relocation assistance suited to the needs of each group of displaced persons. New resettlement sites built for displaced persons must offer improved living conditions (para 20).

29 | LARF, Principle 7 (p 10) and p 64, 66, 84. Principle 7 expressly articulates that "Land acquisition and resettlement should be conceived as an opportunity for improving the livelihoods and living standard of [Project Affected Persons]. Section 3 of the IFC PS5 expressly articulates that the objective of resettlement and compensation programs is to "improve, or restore, the livelihoods and standard of living of displaced persons".

30 | LARF, Principle 8 (p 10) and p 66.

HUMAN RIGHTS VIOLATIONS IN THE CONTEXT OF LAND ACQUISITION

Despite a sufficiently sound legal framework, both the consultation and remediation processes for the Tilenga project have been marred by procedural and substantive deficiencies leading to numerous violations of human rights.

1. Deficiencies in the consultation, negotiation and information-sharing processes

Local organisations allege that the consultation meetings carried out on 12 and 15 November 2018 for the project's ESIA breached many national norms. [31] In May 2019, they initiated a legal action against NEMA and the Petroleum Authority of Uganda (PAU) requesting the cancellation of the project's environmental impact study certificate which had been granted in April 2019.[32] They allege, among other concerns, that an individual with evident conflict of interest had been appointed as presiding officer, [33] that certain groups were denied the right to make formal representations, [34] that affected people were given too little time to present the views [35] and were not provided with complete documentation and that concerns over social impacts were not considered. [36] It also appears that critical documents concerning risk mitigation plans to which the ESIA makes reference have either not been published or made available to communities and local organisations. [37] A ruling on the merits is yet to be rendered, since NEMA and PAU have made several procedural objections.

Concerns regarding access to information and participation have also been raised in relation to the asset valuation procedure. The first Resettlement Action Plan (RAP 1) (covering the proposed industrial zone, including the area for the CPF) refers to a valuation assessment report (theoretically appended as Annexure 1), and an assessment team. However, RAP 1 neither included the assessment report (which does not appear to be available anywhere else) nor provided any detail about the assessment team.[38] Some affected people complain that they only saw the amount of compensation being offered to them on the same day they were asked to sign the compensation agreement.[39] Many complain that the assessment of their land and crops done by Atacama Consulting was not fair and accurate, and even done sometimes without the affected people being present during the asset inspection.[40] In addition, some of the negotiations were conducted on a one-to-one basis instead of collectively, contrary to the "principle of collective negotiations" which, as explained in the LARF, is "fundamental to the acceptance of final compensation packages." [41] Residents believe that this was a tactic to control information, put pressure on single families to accept rates and undermine collective decision-making processes.[42] Many signed under pressure, considering they had no other choice.[43]

Although Total and Atacama Consulting received repeated complaints from affected communities and civil society organizations about these issues, the same practices were repeated in relation to Tilenga's RAPs 2 to 5 (by Atacama Consulting) and the EACOP project (with different subcontractors). [44]

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31 | The Case of Total in Uganda, p 26.

32 | Africa Institute for Energy Governance (AFIEGO), 'Youth and CSO case against Tilenga EIA Certificate set for hearing today', 1 October 2019, https://www.afiego.org/download/update-on-hearing-of-tilenga-case-today-01-10-2019-2/

33 | The appointed presiding officer had held the post of Permanent Secretary of the Ministry of Energy and was at the time the Senior Presidential Advisor on Oil and Gas - both roles requiring an active promotion of the oil industry. This would be in breach of article 5.3 of the 1999 Environmental Impact Assessment Public Hearing Guidelines.

34 | Contrary to article 23.1 of the 1998 Environmental Impact Assessment Regulation.

35 | In breach of article 15.5 of the 1999 Environmental Impact Assessment Public Hearing Guidelines.

36 | Africa Institute for Energy Governance (AFIEGO), 'Youth and CSO case against Tilenga EIA Certificate set for hearing today', 1 October 2019, https://www.afiego.org/download/update-on-hearing-of-tilenga-case-today-01-10-2019-2/ This action is still ongoing.

37 | These include the Environmental and Social Management Plan, the Biodiversity Management Plan, the Stakeholder Communication Plan and the Community Impact Management Strategy, all of which are listed in Section 14.7.9.3 of the ESIA but not included in the ESIA nor published elsewhere. The Case of Total in Uganda, p 31-32.

38 | The Case of Total in Uganda, p 16-17.

39 | New Oil, Same Business? p 69.

40 | The Case of Total in Uganda, p 16.

41 | LARF, p 3.

42 | Rosa Luxemburg Stiftung, 'Preying on the Albertine – A Spotlight over Total E & P Operations in Uganda's Oil Region', https://www.rosalux.or.tz/preying-on-the-albertine-a-spotlight-over-total-ep-operations-in-ugandas-oil-region/#_ftnref13

43 | A Nightmare named Total , p 17.

44 | Some people affected by EACOP have even complained about being forced to sign land forms with which they disagreed or without even knowing the amount of compensation they would receive. A Nightmare named Total, p 17.

2. Insufficient and Inadequate Reparation

Despite the many principles and standards established to ensure fair and full remediation, neither land-for-land nor cash compensation have been sufficient or adequate so far to fully restore many physically and economically displaced people to the living conditions they enjoyed prior to losing their land, let alone enhance them.

Unsuitable land-for-land offers: Under RAP 1, people who stood to lose land were in theory entitled to a choice of replacement land or cash compensation. However, those who opted for replacement land were offered land in areas that were not among their choices, for example because it was too close to the proposed CPF area and therefore unsuitable for people who wished to move away from the project. [45] Affected people's suggestion to Atacama Consulting that community representatives be involved in selecting suitable land was declined. Their requests for replacement land to be suitable for both grazing and growing crops were also ignored. Affected people also accuse Atacama Consulting of offering plots of land too small to accommodate full clans or households. [46] Accepting these plots would mean having to separate from clan or family members, with the resulting destruction of their traditional clan or family-based organisational, social and cultural practices. [47]

The lack of acceptable land-for-land options and the fear of experiencing the same abuses suffered by those displaced by the government-led refinery project [48] (see below) made the majority of people opt for cash compensation, making the principles of choice and prioritisation of land over cash an illusion. [49] The goal of preserving social networks and considering communities' preferences set out in both LARF and RAP 1 and the principle of respect for "existing social and cultural institutions of the displaced persons" in PS5 were also evidently disregarded. [50] By May 2019 (almost one year and a half after the launch of RAP 1), only 3 of the 622 affected families had opted for replacement land. [51] The RAP 1 has now been almost finalized : 581 families (around 95% of the population affected by RAP 1) have received cash compensation, and although only 32 families have chosen a compensation in kind, Total concentrates its communication on this type of compensation. The cash compensation is much less costly for Total as the average amount per family for cash compensation is 2,700 dollars, while it is 4,200 dollars per family for in kind compensation, and for those who benefit from a new house, it is worth around 40,000 dollars.[52]

Insufficient cash compensation: Under RAP 1, people who opted for cash compensation were offered a total of 3.5 million Ugandan Shillings (UGX) per acre of land. However, this amount did not permit recipients to purchase land equivalent to that lost. This is because there was very little land available at that price in the areas surrounding the project and none at all in areas further away from it which many families preferred as a way of escaping the ongoing risks of living in close proximity of the project. [53] In some cases, available land was deemed inadequate because it was not big enough to accommodate entire families.[54] Once again, the key normative standards described above were ignored, and so was LARF's requirement that cash compensation "be based on a documented assessment of the ability of the affected person to use the cash to restore and improve their housing standards". [55]

45 | The replacement land that Total Uganda and Atacama Consulting offered was limited to four villages close to the planned CPF in Buliisa. The Case of Total in Uganda, p 13.

46 | The Case of Total in Uganda, p 13.

47 | New Oil, Same Business? p 86.

48 | The Case of Total in Uganda, p 15.

49 | New Oil, Same Business? p 88.

50 | LARF, p 154 (Annex 5, 6.c), Principle 8 (p 10), and p 50 (Table 5 - Replacement land identification and selection), among others. RAP 1, p 14 (replicating key principles contained in LARF) and p 152-153. IFC PS5, Section 20.

51 | The Case of Total in Uganda, p. 14. It appears that, by the end of 2019, 31 families had taken the offer of land replacement, which is still a small fraction of the total number of affected people. Total, Universal Registration Document 2019, March 2020, p 112, https://www.total.com/sites/g/files/nytnzq111/files/atoms/files/2019_total_universal_registration_document.pdf

52 | Responses to AGM written questions, p. 66; see also Tilenga RAP 1, p. 123, https://www.scribd.com/document/411336100/Final-Tilenga-Project-Rap1-Report.

53 | See NTV report, "Buliisa residents reject land compensation rates", 25 May 2018, https://www.youtube.com/watch?v=Vvqu8uOT7OI See also New oil, same business?, p 61, 87 and The Case of Total in Uganda, p 13.

54 | New Oil, Same Business? p 87. The Case of Total in Uganda, p 17.

55 | LARF, Principle 8 (p 10).

Inadequate redress for loss of communal land: RAP 1 proposed to locate the CPF on communal grazing lands. However, it did not offer users of these lands alternative land which would allow them to maintain their grazing and natural resource-harvesting activities. This is because, as RAP 1 explains, there no longer was available land which was not occupied or used by others.[56] Instead, affected people were offered transitional support to develop alternative livelihoods.[57] This was inadequate on at least three counts. Firstly, this type of program does not make up for the loss of social networks linked to communal land-sharing and the livelihood support systems these networks provide. These losses not only affect livelihoods, but they strike at the very core of the communities' sense of identity and collective way of life.[58] Secondly, the training some people were offered to secure new sources of income such as hairdressing or driving did not offer the prospect of long-term income and food security that their traditional cattle rearing and harvesting activities provided.[59] Thirdly, affected households traditionally adopt a variety of strategies to generate income such as agriculture, livestock rearing, natural resource harvesting and fishing. Losing communal lands means losing the ability to carry out these activities too, forcing people to rely on a single source of income and increasing their vulnerability.[60] This once again appears contrary to PS5, which establishes that for economically displaced persons whose livelihoods are land-based, replacement land at least equivalent to that being lost should be offered as a matter of priority.[61]

The Kyakaboga resettlement camp: The Ugandan government, through the Ministry of Energy and Mineral Development, relocated 83 families to the Kyakaboga resettlement camp to make way for the construction of the Kabaale Industrial Park. This Park, including the oil refinery that will be located within it, are not part of the Tilenga or EACOP projects, but are intimately related to them as part of the overall oil development project.[62] It is an element of the project directly led by the state. Despite having previously enjoyed full recognition of their land tenure rights, the relocated families received no guarantee of similar recognition over the new land. This rendered them more vulnerable to future expropriations. In addition, the farming land which was provided was far away from the houses, requiring longer time to reach it. This disproportionately impacted women who tend to be responsible for collection of wood and water and natural resource harvesting.[63] The camp layout and house allocation caused family and clan members to separate, undermining their ability to maintain their traditional social and cultural practices.[64] In addition to the inadequacy of the housing provided, 46 families had to wait five years since they lost their land until they were effectively relocated, suffering food shortages, lack of access to healthcare and schooling in the meantime. 37 families remain in that situation today.[65]

IMAGE BY LAMBERT COLEMAN/HANS LUCAS

56 | RAP 1, p 178.

57 | RAP 1, p 143, 149. IFC PS5 envisages economically displaced persons being compensated through a "Livelihood Restoration Plan" (para 25).

58 | Recognised and protected, for example, by article 26.1 of the UN Declaration on the Rights of Peasants and other People Working in Rural Areas.

59 | For example, Kyakabooga residents highlighted that the hairdressing training they received was of no use as all the women in the village were trained in the same skill. New Oil, Same Business? p 90.

60 | New Oil, Same Business? p 90.

61 | IFC PS5, Section 28. This section also establishes that those losing access to natural resources should be provided with alternative resources with equivalent livelihood-earning potential and accessibility and, where appropriate, "be collective in nature rather than directly oriented towards individuals or households."

62 | New Oil, Same Business? p 57.

63 | New Oil, Same Business? p 58.

64 | New Oil, Same Business? p 58.

65 | While the land of all 83 families was expropriated in 2012, 46 families were only relocated in 2019 and 37 still await relocation today. A court case against the government of Uganda was initiated in 2014 and is still ongoing. The Case of Total in Uganda, p 16.

3. Delays in Compensation and Relocation leading to serious human rights violations

The companies established cut-off dates after which no new assets or investments would be considered for compensation. [66] Repeated delays in the project and suspensions of the compensation program left communities grappling with the dilemma of whether to continue working the land, with the risk of losing new crops and investments, or refrain from working it, with the consequent loss of income and ability to feed themselves. [67] It appears that Atacama Consulting and Total Uganda actively told some affected communities that they could not use the land at all. [68] In practice, residents were deprived of the use and enjoyment of their land without receiving prompt compensation for their loss, in clear violation of Uganda's constitutional provisions on expropriation and compensation as well as project specific standards. PS5, for example, clearly stipulates that "The client will take possession of acquired land and related assets only after compensation has been made available…" [69] According to many testimonies, already vulnerable communities were pushed to the point of starvation and many were no longer able to afford the cost of health care or education for their children. [70] While Total Uganda initiated a food distribution program for RAP 1, this only started 18 months after people were prevented from using their land and even then, most families complained that the quantity of food they received was insufficient. [71] Despite the humanitarian disaster this situation generated and the multiple and ongoing complaints from affected communities, the same pattern is now being repeated in the context of Tilenga's RAPs 2 to 5 and EACOP, leading to the same human rights abuses affecting now more than 100,000 people in Uganda and Tanzania. [72] Families affected by Tilenga's RAP 2 to 5 and EACOP are still waiting for their compensation, for more than two years now. No food distribution has been put in place for them yet. [73]

SUPPRESSION OF DISSENT

The heavy presence of armed forces in the Albertine region and multiple instances of police brutality, arbitrary detentions and surveillance has created an atmosphere of fear and intimidation within local communities and local organisations and hampered their ability to voice concerns. [74]

Violence and other abuses against human rights defenders (HRDs): In the spring of 2018, an "oil police" station was established at the entrance of the CPF zone, even though there was no facility requiring such security at the time (and to the present day). Local residents and organisations complained that this was stationed there with the sole purpose of intimidating people and preventing them from accessing their land. [75] In recent years, the police have arrested many environmental and HRDs denouncing the oil projects in the region. For example, on 23 August 2020, a group of around ten people were arrested during a meeting held by the NGO Global Rights Alert to discuss the EACOP project. [76] Police have also dispersed public meetings to discuss the oil projects, prevented visits to affected communities [77] and placed activists under surveillance. [78] These repressive police tactics date back many years. In a report released in September 2020, the International Federation for Human Rights (FIDH) gives an account of earlier abuses, including instances of arbitrary detentions, violence, torture, and surveillance of members of local organisations

66 | Cut-off dates are contemplated under both LARF and RAP 1: LARF, Principle 6 (p 10) and p 37 (Table 4 - Cut-off date). RAP 1, p 31 (Table 1 - Cut-off dates) and p 86 (point 6.5.2).

67 | Rosa Luxemburg Stiftung, 'Preying on the Albertine – A Spotlight over Total E & P Operations in Uganda's Oil Region', https://www.rosalux.or.tz/preying-on-the-albertine-a-spotlight-over-total-ep-operations-in-ugandas-oil-region/#_ftnref13

68 | The Case of Total in Uganda, p 20.

69 | IFC PS5, Section 9. The Case of Total in Uganda, p 19-20. A Nightmare named Total , p 7, 10-11.

70 | The Case of Total in Uganda, p 21-22. Rosa Luxemburg Stiftung, 'Preying on the Albertine – A Spotlight over Total E & P Operations in Uganda's Oil Region', https://www.rosalux.or.tz/preying-on-the-albertine-a-spotlight-over-total-ep-operations-in-ugandas-oil-region/#_ftnref13

71 | The Case of Total in Uganda, p 21. This also appears to be the pattern for people affected by subsequent RAPs.

72 | A Nightmare named Total , p 10-11.

73 | Response s to AGM written questions.

74 | New Oil, Same Business?, p 34. Amnesty International, Human Rights in Africa (Review of 2019), AFR 01/1352/2020, p 92, https://www.amnesty.org/en/wp-content/uploads/2021/05/AFR0113522020ENGLISH.pdf

75 | The Case of Total in Uganda, p 20.

76 | A Nightmare named Total , p 20.

77 | The Case of Total in Uganda, p 24. NTV report, 'Buliisa residents reject land compensation rates', 25 May 2018, https://www.youtube.com/watch?v=Vvqu8uOT7OI

78 | The Case of Total in Uganda, p 21.

Ngetha Media Association for Peace and the Oil Refinery Residents Association. [79] Total is planning to conclude an agreement with Ugandan public security forces in the area, to be implemented in the construction phase of the project. Despite the risks for human rights defenders, it appears that this agreement will remain confidential. [80]

Witness intimidation and reprisals: Two Ugandan HRDs who attended the first hearing of a legal action brought against Total in France on 12 December 2019 suffered a multiplicity of abuses both before their departure and on their return from France. These included arbitrary detention and interrogation by Ugandan immigration officials, attacks to their houses by unidentified people and a campaign of false information about them. [81] A number of UN Special Procedures wrote to both TotalEnergies S.E. and Total Uganda to raise concerns about the situation of these defenders. [82] In its response to the UN Special Procedures, Total stated that after conducting inquiries on the matter, the company concluded that neither Total Uganda nor Atacama employees had been involved in any of the actions. [83] However, the companies did not disclose any details about this investigation. In its 2020 report on the case, FIDH explains that despite Total suggesting that it had raised concerns with the authorities, these defenders were still subject to an exit ban and their photos were being circulated among high-level authorities, including within the police's Oil and Gas Protection Unit. [84] Almost two years after their trip to France, they say that they are still subject to intimidation, including physical surveillance, death threat and repeated anonymous calls. [85]

Shrinking civic space: Uganda has enacted a number of laws that significantly impair the ability of human rights organisations to carry out their work effectively. [86] The 2016 Non-governmental Organisations Act imposes excessive requirements on organisations to be able to operate [87] and contains a number of vaguely defined obligations, the breach of which can lead to criminal penalties. [88] Legal requirements have also been misapplied to stifle peaceful assembly and protest. For example, the police often interprets the requirement of prior notification of an assembly under Uganda's 2013 Public Order Management Act as requiring permission, giving it the ability to block peaceful assemblies. [89] These repressive laws and practices have directly affected the work of organisations and HRDs scrutinising oil developments in the Albertine Region. They have reported intimidation, excessive administrative scrutiny and threat of closure. [90] In May 2021, a member of AFIEGO, victim of increasing harassment, [91] was arrested while he was accompanying an Italian journalist to interview affected communities; he was detained arbitrarily and unlawfully by the police during 50 hours. [92] In August 2021, the Ugandan government has decided to suspend 54 NGOs, including AFIEGO, a decision considered as "part of the political harassment of citizens and NGOs" . [93]

79 | New Oil, Same Business? p 37.

80 | New Oil, Same Business? p 35. See also Responses to AGM written questions, p. 71..

81 | New Oil, Same Business? p 37. Amnesty International, Human Rights in Africa (Review of 2019), AFR 01/1352/2020, p 93, https://www.amnesty.org/download/Documents/AFR0113522020ENGLISH.PDF

82 | See Letter to Pierre Jessua, Managing Director, Total E&P Uganda, from the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Working Group on the issue of human rights and transnational corporations and other business enterprises; the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment and the Special Rapporteur on the situation of human rights defenders dated 20 April 2020, https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=25135

83 | Total's letter of response to UN Special Procedures dated 18 May 2020, https://spcommreports.ohchr.org/TMResultsBase/DownLoadFile?gId=35313

84 | New Oil, Same Business? p 38.

85 | See an extract of interview of these two human rights defenders, filmed in September 2020 (1'30"): https://www.youtube.com/watch?v=CL8pp8GUJhU

86 | National Coalition of Human Rights Defenders Uganda, 'Democracy on Trial', September 2019, https://hrdcoalition.ug/wpcontent/uploads/2020/07/Democracy-on-Trial-Report.pdf . New Oil, Same Business? p 32-33, 39-42.

87 | These include, for example, a prohibition under article 44(a) to carry out activities in any part of the country unless the non-governmental organisation has approval from both the District Non-Governmental Monitoring Committee (DNMC) and the local government, and unless it has signed a memorandum of understanding to that effect.

88 | Including, for example, a prohibition under article 44(f) to engage in "any act which is prejudicial to the interests of Uganda and the dignity of the people of Uganda".

89 | National Coalition of Human Rights Defenders Uganda, 'Democracy on Trial', September 2019, p 14, https://hrdcoalition.ug/wpcontent/uploads/2020/07/Democracy-on-Trial-Report.pdf

90 | National Coalition of Human Rights Defenders Uganda, 'Democracy on Trial', September 2019, p 47, https://hrdcoalition.ug/wpcontent/uploads/2020/07/Democracy-on-Trial-Report.pdf Amnesty International, Human Rights in Africa (Review of 2019), AFR 01/1352/2020, p 92, https://www.amnesty.org/en/wp-content/uploads/2021/05/AFR0113522020ENGLISH.pdf.

91 | See his interview in Libération on April 16, 2020 : "Projet pétrolier de Total en Ouganda : J'ai dû fuir mon village" https://www.liberation.fr/terre/2020/04/16/projet-petrolier-de-total-en-ouganda-j-ai-du-fuir-mon-village_1785050/?redirected=1&redirected=1

THE DUTY OF VIGILANCE AND LEGAL ACTION IN FRANCE

France's Duty of Vigilance law: In March 2017, France passed the duty of vigilance law. [94] This law imposes an obligation on very large companies to establish, publish and effectively implement a "vigilance plan" to identify risks and prevent "serious violations of human rights and fundamental freedoms, health and safety of persons and the environment" by their own activities and those of companies they control, directly or indirectly, as well as those of subcontractors and suppliers with whom they maintain an "established commercial relationship." Companies that allegedly fail to draw up, publish and/or effectively implement a vigilance plan can be served with a formal notice to comply. If after three months from this notice they are still seen as in breach of their duties, any interested party may request a court order for the company to comply with the law. Critically, the law also establishes that a failure to comply with the vigilance duties can give rise to civil liability for damages that the implementation of those duties could have prevented. If found liable, the company would have to pay compensation to the claimants.

Total's Vigilance Plan: Total's 2017 vigilance plan (published in 2018) did not include any specific vigilance measures concerning the Tilenga project (or its associated EACOP project). The company's potential human rights impacts were described in a perfunctory manner in relation to the group as a whole. No detail was given as to specific geographical areas of operation, subsidiaries, suppliers or subcontractors. [95] The entire plan was 7 pages long and was so generic that it could have been the plan of any oil company. [96] Only a Human Rights Briefing Paper dated April 2018 made two passing references to the Tilenga and EACOP projects with very little detail about specific human rights risks and prevention plans. [97] The following year, Total updated its vigilance plan,[98] but the new plan still failed to make any reference to the risks and impacts associated with the Tilenga and EACOP projects. [99]

The legal action: In October 2019, after an unsatisfactory response from Total, a group of six French and Ugandan NGOs - Friends of the Earth France, Survie, AFIEGO, CRED, NAPE/Friends of the Earth Uganda and NAVODA - filed a legal claim against the company, under summary proceedings, requesting the court to order Total to produce a new vigilance plan which was compliant with the law and included issues related to its Tilenga and EACOP projects, and to implement effectively the vigilance measures on the ground. [100] On 30 January 2020, the Nanterre High Court considered it did not have jurisdiction to hear the case and referred it to the commercial court (Tribunal de Commerce). [101] The court interpreted the vigilance duties primarily as management matters to be naturally decided by commercial courts. [102] On 10 December 2020, the Versailles Court of Appeal confirmed this decision. [103] The claimants are now appealing the decision before the Supreme Court (Cour de Cassation) which will issue its ruling by the end of 2021. In the meantime, violations in Uganda and Tanzania have continued, now affecting more than 100,000 people, and the claimants fear that, because of the delays created by these procedural issues, any court ruling on the merits of the case will come too late.

92 | See Reporterre, "En Ouganda, les pressions à l'encontre des opposants de Total s'intensifient", May 28th 2021, https://reporterre.net/En-Ouganda-les-pressions-a-l-encontre-des-opposants-de-Total-s-intensifient ; and Friends of the Earth France and Survie "Our Ugandan partner finally released, but on police bond", May 27th 2021 https://www.amisdelaterre.org/communique-presse/our-ugandan-partner-finally-released-but-on-police-bond/

93 | Al Jazeera "Uganda suspends more than 50 rights groups, citing non-compliance", August 20th 2021 https://www.aljazeera.com/news/2021/8/20/uganda-suspends-over-50-rights-groups-citing-non-compliance. See also AFIEGO's press release questioning the legality of this suspension. https://www.afiego.org/download/press-release-afiegos-response-to-ngo-bureaus-allegations-20-august-2021/?wpdmdl=2530&refresh=611f915506a601629458773

94 | Law No. 2017-399 of 27 March 2017 on the corporate duty of vigilance for parent and instructing companies, https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000034290626?r=Od1SwytfgM

95 | The Case of Total in Uganda, p 7-8. See also ActionAid France et al, 'The Law on Duty of Vigilance of Parent and Outsourcing Companies. Year 1: Companies Must Do Better', February 2019, p. 21, 23-24, https://corporatejustice.org/2019_collective_report_-_duty_of_vigilance_year_1.pdf

96 | See Total, Universal Registration Document 2017, March 2018, p 96-102, https://www.sustainable-performance.total.com/sites/g/files/wompnd1016/f/atoms/files/ddr2017_va.pdf

97 | Total, 'Human Rights Briefing Paper Update', April 2018, p. 27, 29, https://www.total.com/sites/g/files/nytnzq111/files/atoms/files/human_rights_-_briefing_paper_update.pdf,

98 | https://www.sustainable-performance.total.com/en/reporting/vigilance-plan

99 | The Case of Total in Uganda, p 6.

100 | Tribunal Judiciaire de Nanterre, 30 January 2020, n° 19/02833, https://www.amisdelaterre.org/wp-content/uploads/2020/03/decision-tgi-nanterre-30012020-adt-survie-c-total.pdf Friends of the Earth France and Survie, 'Total Uganda - A first lawsuit under the duty of vigilance law: an update', October 2020 (from now on "Total Uganda - A first lawsuit"), p 2, https://www.amisdelaterre.org/wp-content/uploads/2020/10/total-uganda-legal-brief-foefrance-survie.pdf

101 | Total Uganda - A first lawsuit, p 2.

New plan, same shortcomings: In March 2020, the company published a new vigilance plan.[104] Although more substantial than its predecessors, the claimants allege that the new plan still primarily concerns internal processes and that the shortcomings in previous plans remain largely unaddressed.[105] The Tilenga and EACOP projects are still not addressed specifically. They are instead mentioned once in the vigilance plan implementation report as an example of projects under civil society scrutiny.[106] Instead of addressing risks and impacts associated with its Uganda oil projects within the company's vigilance plan, as would be expected, the company refers to a separate place on its website where it responds to concerns raised by civil society actors. It also refers to an analysis conducted in November 2019 which concluded that Total Uganda had followed procedures to mitigate risks associated with the land acquisition[107] – an analysis that the company only published in March 2021.[108]

2. LESSONS FOR THE THIRD REVISED DRAFT TREATY

The multiple shortcomings and challenges in human rights protection in the Tilenga, EACOP and associated projects offer many lessons for the third revised draft treaty. This section will address some of them, by no means exhaustive of all failure and challenges in this case,[109] grouped together under the following four broad categories: 1. State obligation to oversee and enforce human rights norms in the context of business activities; 2. Corporate obligations to respect human rights; 3. Obligation to ensure culturally appropriate remediation; 4. Access to home state justice.

1. STATE OBLIGATION TO OVERSEE AND ENFORCE HUMAN RIGHTS STANDARDS IN THE CONTEXT OF BUSINESS ACTIVITIES

The failure of the State of Uganda to respect, and ensure respect for, international, national and project-specific human rights standards in the handling of the land acquisition and resettlement processes of the Tilenga and EACOP projects as well as the associated government-led refinery project is apparent throughout the entire case.

Among the many international human rights standards Uganda is failing to observe and ensure observance of, are those protecting the rights to adequate food,[110] housing[111] (and, by definition, the right to an adequate standard of living[112]) and the right to an effective remedy.[113] These failures are manifest in the acts and omissions of the various agencies tasked with taking forward or overseeing diverse aspects of the oil development project.[114]

102 | Total Uganda - A first lawsuit , p 6.

103 | Friends of the Earth France and Survie, 'Total Uganda case in France: the Court of Appeal of Versailles remands the case to the commercial court', 10 December 2020, https://www.amisdelaterre.org/communique-presse/total-uganda-case-in-france-the-court-of-appeal-of-versailles-refers-to-the-commercial-court/

104 | Total, Universal Registration Document 2019, March 2020, Chapter 3.6, https://www.total.com/sites/g/files/nytnzq111/files/atoms/files/2019_total_universal_registration_document.pdf

105 | Total Uganda - A first lawsuit , p 4.

106 | Total, Universal Registration Document 2019, 23 March 2020, p 112-3, https://www.total.com/sites/g/files/nytnzq111/files/atoms/files/2019_total_universal_registration_document.pdf

107 | Total, Universal Registration Document 2019, 23 March 2020, p 113, https://www.total.com/sites/g/files/nytnzq111/files/atoms/files/2019_total_universal_registration_document.pdf Friends of the Earth France et al, 'Total Uganda - A first lawsuit under the duty of vigilance law: an update', October 2020, p 5, https://www.amisdelaterre.org/wp-content/uploads/2020/10/total-uganda-legal-brief-foefrance-survie.pdf

108 | Total E&P Uganda, Investigation Vigilance, December 2019, https://www.total.com/sites/g/files/nytnzq111/files/documents/2021-03/Total_EP_Uganda_Rapport_Investigation_Vigilance.pdf

109 | For example, this study does not address the implications of the Tilenga and EACOP projects for the current climate crisis, which are significant and concerning. However, since the current climate breakdown unquestionably poses severe risks to human rights and the Tilenga and associated oil projects will inevitably exacerbate the climate crises, the duties of both the oil companies and government of Uganda in this regard are implicitly addressed through the discussion on state duties to respect and protect human rights and the oil companies' duty to prevent human rights abuses.

110 | Article 11, International Covenant on Economic, Social and Cultural Rights.

111 | Article 11, International Covenant on Economic, Social and Cultural Rights. The right to adequate housing includes a right not to be subjected to forced evictions, as laid down in General Comment No. 7: The right to adequate housing (art.11 (1) of the Covenant): Forced Evictions, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT/CESCR/GEC/6430&Lang=en and the UN Basic Principles and Guidelines on Development-Based Evictions and Displacement, https://www.ohchr.org/Documents/Issues/Housing/Guidelines_en.pdf

112 | Under international human rights law, everyone has the right to adequate food and housing as components of the right to an adequate standard of living. Article 11, International Covenant on Economic, Social and Cultural Rights.

113 | Protected under many international human rights instruments such as article 2.3 of the International Covenant on Civil and Political Rights and the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

The multiple infringements of the right to adequate housing of families relocated to the Kyakaboga resettlement camp illustrate how the state itself, through its own acts, can directly violate human rights in the context of business activity. This is also evident in the government's approach to community dissent. Through the aggressive tactics of local police and restrictive laws, Uganda is violating the rights of local communities and HRDs to freedom of expression, association and assembly, among many other civil and political rights. These examples underscore the need for the treaty to reinforce its provisions concerning the **state obligation to respect** human rights in the context of business activities.

The government is also failing in its **obligation to protect**. It failed to ensure Total Uganda and its sub-contractors observe key human rights safeguards in the process of acquiring land and compensating those affected by Tilenga's RAP 1 (failures that are now unfolding in the context of Tilenga's RAPs 2 to 5 and EACOP). The government signed off to inadequate valuations (through the CGV), granted an environmental licence despite procedural failures in the consultation process (through NEMA), relied on private actors with inherent conflicts of interest to lead the compensation process (allowing this process to render tens of thousands of people destitute) and failed to ensure disclosure of critical documentation to ensure informed negotiations. In practice, the government relinquished its role as human rights guarantor and left communities to fend for themselves. This highlights the importance for the treaty to include stronger provisions on the **state obligation to protect** in the context of business activities and to flesh out specific state obligations to regulate, monitor and enforce human rights norms in these contexts.

In relation to protection of human rights defenders, the third revised draft treaty already contains some important provisions, such as the duty of states to guarantee a safe and enabling environment for human rights defenders (including freedom from threat, intimidation, violence and insecurity) under **Art 5.2** and protection from any unlawful interference in the context of legal proceedings under **Art 5.1**. However, by inserting these provisions in **Art 5** on **Protection of Victims**, the treaty is incorrectly addressing human rights defenders as "victims" as well as failing to capture their central role in prevention. In addition, the risk of criminalisation and arbitrary arrest typically faced by human rights defenders across the globe and which this case illustrates well is not properly captured by current provisions.

IMAGE BY AMIS DE LA TERRA FRANCE

114 | For illustrative purposes, this study focuses on some human rights breaches, but the government of Uganda failed to respect, and ensure respect for, many other international standards. These include many other economic, social and cultural rights under the International Covenant on Economic, Social and Cultural Rights, many rights under the International Covenant on Civil and Political rights, the UN Declaration on the Rights of Human Rights Defenders and the UN Declaration on the Rights of Peasants and other People Working in Rural Areas (UNDROP).

In light of the above account, the treaty should:

- Introduce provisions designed to deal with the **State Obligation to Respect** human rights in the context of business activities, including the state obligation to ensure adherence to international human rights standards by its own bodies, agents and officials when operating in the context of business activity and to investigate, sanction and effectively remedy its own failures in this context. These additional provisions could be included under **Art 6** on **Prevention** (as a separate section from current provisions dealing with corporate human rights due diligence) or, more adequately, in a separate new article dealing specifically with **State Monitoring and Enforcement**. Provisions on investigation and sanction of the state's own misconduct could be included in, or following, **Art 5.3** that deals with the state duty to investigate and/or **Art 8.3** that deals with the state duty to sanction criminal offences and regulatory breaches.
- Include provisions requiring States Parties to establish robust regulatory bodies that are capable of overseeing corporate activities effectively and independently, including by providing them with sufficient levels of financial and technical resources. As part of their regulatory functions, these bodies should require business enterprises that need environmental and other licences to operate (such as the EIA certificate in this case) to demonstrate respect for human rights in their operations as a condition for both receiving and maintaining such licences. These provisions could be included in **Art 6** or in a new article on **State Monitoring and Enforcement**, as suggested above.
- Add a provision under **Art 6** on **Prevention** clearly articulating the obligation of the state to guarantee the right of access to information that is relevant for the effective protection of human rights in the context of business activities as well as in order to support legal liability processes. This could be a stand-alone provision focused on access to information or it could be included within a broader provision focused on the obligation of the state to guarantee the right to the free prior and informed consent of indigenous communities and the human right of individuals and groups to participate meaningfully in decision-making processes related to business activities that are likely to impact the environment and other human rights. As most information is held by the companies and not disclosed/publicly available, the treaty should also include stronger provisions on access to information from both the corporations and the public authorities. The treaty should require states to adopt legislation allowing for individuals and organisations to file requests for the disclosure of relevant documents. In particular, within the context of actual or future litigation, provisions should be included on access to information and evidence through discovery procedures, and on the reversal of the burden of the proof.
- Retain the current provision on human rights defenders in **Art 5.2** but move it to **Art 6** on **Prevention** to recognise the critical role that human rights defenders play in the context of prevention (i.e. not just when abuses have occurred), to ensure protection of their rights before violations occur. In addition, add explicit reference to protection from criminalisation and arbitrary arrest, access to effective remedy and independent, prompt inquiries in case such criminalisation occurs.

2. CORPORATE OBLIGATIONS TO RESPECT HUMAN RIGHTS

Total failed to ensure its fully owned subsidiary and its subcontractor's, Atacama Consulting, respect for the human rights of project-affected communities in the context of RAP 1. The company is repeating the same failure in the context of RAPs 2 to 5 and of EACOP. In this regard, Total appears to be unable or unwilling to learn the lessons of RAP 1 and correct course to avoid replicating the same human rights abuses in the context of

RAPs 2 to 5 and EACOP. This case illustrates how multinational enterprises in a position of control, oversight or supervision over the activities of their business relationships including entities in their value chains often fail to take action to prevent serious harm when they could, while ripping off the benefits of those activities. Total's failures in this case throw a number of key lessons for the treaty: the need to defend provisions articulating the corporate duty to respect human rights throughout the multinational company's value chain and business relationships and the need to articulate an express duty of companies to take immediate steps to identify, prevent, cease, and avoid recurrence of, abuses.

Total's failure to disclose key documents, or to disclose them in a timely and accessible manner, breached the indigenous communities' right to free prior and informed consent, and peasants and rural communities' right to information and to participate meaningfully in all decision-making processes concerning expropriation and remediation. Disclosure deficits seem to be permeating all aspects of this project, including the company's own investigations into alleged abuses and security arrangements with the state. To address this deficit, the treaty should contain stronger provisions on corporate transparency and disclosure (which should be addressed in the context of both state obligations, as suggested above, and corporate duties).

Total's failure to provide a detailed account of the human rights risks and impacts of its Tilenga and EACOP projects as well as of the measures to prevent and address them in its vigilance plans undermines the ability of interested parties (and society as a whole) to understand and assess the adequacy of the company's strategy to prevent human rights violations, a key objective of the duty of vigilance law (and of non-financial reporting norms more broadly, under modern criteria). While **Art 6.4(e)** of the third revised draft now includes important new reporting fields, such as group structures and suppliers, it should go further by incorporating key fields that are currently missing and by articulating the overall objective of non-financial reporting.

115 | Under this criterion, the objective of non-financial reporting is to provide a picture of a company's impact on society (as against itself). Recital 3 and article 1 of the 2014 EU Non-Financial Reporting Directive expressly articulate this objective.

Based on the above account, the treaty should:

- Retain the important language in the **Preamble** and in **Art 6.2** on the corporate duty to respect [all internationally recognised] human rights and prevent human rights violations, in **Art 6.3** on the duty of companies to exercise human rights due diligence and in **Art 6.3(b)** on the corporate duty to take measures to prevent actual or potential human rights violations, but remove the added reference to "mitigate" from **Art 6.2** and **6.3(b)** to make clear that the paramount objective of legislation and of human rights due diligence is the prevention of violations (as the French duty of vigilance law clearly stipulates);

- Given the frequency of human rights violations in the context of subcontracting relationships (such as that between TotalEnergies S.E./Total Uganda and Atacama Consulting in this case), and to avoid all doubt, expressly add "subcontractors" to the list of "business relationships" under **Art 1.5**.

- Add to the specific human rights due diligence steps listed under **Art 6.3**, a duty to take immediate and effective measures to cease ongoing human rights violations and to avoid recurrence of such violations, including the total cease of operations if needed.

- Articulate better **Art. 6** on Prevention and **Art. 8** on liability (see below)

- Add to **Art 6.4(a)** on environmental and human rights impact assessments that these assessments should be financed by the corporations but undertook by independent entities, conducted in a **transparent** and **participatory** manner and drawing from input and knowledge of those likely to be impacted. Mechanisms should be put in place to ensure that the independence and impartiality of the entities can be verified by third parties prior to the assessment being conducted, including through the publication of information pertaining to the

recruitment and selection process. Any previous or current relationship that the entity has with the relevant stakeholders, including the corporation but also public authorities, should be publicly disclosed.

- Add to the list of human rights due diligence measures under **Art 6.4**, a duty to proactively disclose to project-affected people, in a timely, accessible and culturally-appropriate manner, all documentation that is relevant for a proper understanding of the risks and impacts entailed by these projects as well as measures to prevent and mitigate them.

- Clarify in **Art 6.4(e)** that non-financial reporting should be for the purpose of allowing a full and proper understanding of the adequacy of a company's response to its human rights risks and impacts. Additionally, incorporate the following reporting fields: human right policies, human rights due diligence processes, identified human rights risks and impacts, actions taken to address them and their outcomes, which, at least for high risk operations, should be broken down by place, project or activity and entity in the value chain.

3. DUTY TO ENSURE CULTURALLY APPROPRIATE REMEDIATION [116]

The culturally-insensitive, market-based approach to remediation of the Tilenga and EACOP oil projects is leading to multiple shortcomings in the reparation measures that are being offered to affected communities. The replacement land is not "equal in value" to that being lost because it cannot sustain the same economic, social and cultural practices of the affected communities. Yet, these elements also make up the value of land for communities and are, in fact, an integral part of the human right to land. [117] The exclusive focus on the market value of land means that those critical elements are not contemplated in the calculation of cash compensation either. [118] The result is that neither the replacement land nor the cash alternative are sufficient to compensate communities for all losses and therefore capable of fully restoring their standard of living.

The offer of livelihood restoration programs instead of land (or cash sufficient to acquire equivalent land), to people who lose communal land is inadequate on similar grounds, as they threaten to undermine people's traditional social networks, livelihood support systems, economic resilience and, as expressed above, the very essence of who they are. Similar shortcomings are evident in relation to the Kyakaboga resettlement camp, where families were unable to maintain their traditional family or clan-based organisational structures and social, economic and cultural practices because of the way in which homes and land were allocated.

Rather than improving their standard of living, the compensation provided is rendering people more vulnerable to further human rights violations. To a large extent, this can be explained by the apparent unwillingness or inability of both companies and government to listen to, and take into account, the views and concerns of affected people, which is what would help ensure that reparation measures are indeed "equal in value" (from the point of view of affected communities), "culturally appropriate" and "tailored to their specific characteristics".

The third revised draft treaty already incorporates important principles relating to the right to remedy, such as the requirement for "fair, adequate, effective, prompt, non-discriminatory, appropriate and gender sensitive" access to justice in **Art 4.2(c)** and for reparations to be "adequate, prompt, effective, gender and age responsive" in **Art 8.4**. However, the deficiencies in the compensatory regime of the land acquired for the Tilenga and EACOP projects as well as the fact that affected communities do not have access to an effective remedy for the additional human rights violations they suffered as a result of the deficiencies in the land acquisition process,

116 | The UN basic principles and guidelines on development-based evictions and displacement (A/HRC/4/18) contain detailed and useful guidance for what constitutes a proper compensation (in kind or in cash) and a proper remedy, see paras 52-58 (on resettlement), art 60 & following (on remedy), https://www.undocs.org/A/HRC/4/18, pp. 13 and following.

117 | FIAN, 'The Human Right To Land: Position Paper', November 2017, https://www.fian.org/fileadmin/media/publications_2017/ Reports_and_Guidelines/FIAN_Position_paper_on_the_Human_Right_to_Land_en_061117web.pdf

118 | New Oil, Same Business? p 87.

119 | UN General Assembly, 'Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises', A/72/162, 18 July 2017, para 20.

highlight the need for additional provisions to guarantee participatory and culturally-appropriate decision-making processes concerning remediation. This is critical to allow all parties to identify and understand the unique, culturally-specific way in which business activities impact people based on their particular characteristics and way of life, and to design reparation measures that are themselves culturally-appropriate and tailored to those specific characteristics. [119] It is also key that access to justice includes effective remedy for the violations derived from the initial violation.

In light of the above account, the treaty should:

- Retain the language of "adequate, prompt, effective and gender-responsive" reparations used in **Art 8.4** but consider adding "full" (as provided for in Principle 18 of the UN Basic Principles on the Right to Remedy) and "culturally appropriate" to ensure that reparations: 1. cover all, and not only a limited number of harms and; 2: are tailored to the particular characteristics and way of life of the affected people. These principles could also be articulated in a stand-alone provision under **Art 4** on the **Rights of Victims**.

- Establish the principle under **Art 4** (or in the **Preamble**) that victims, and victims' needs, must remain at the centre of all reparation processes. [120]

- Add a new provision under **Art 4** articulating the right of victims to participate meaningfully in culturally-appropriate decision-making processes concerning reparations.

4. ACCESS TO HOME STATE JUSTICE

France's duty of vigilance law is the first law in the world to impose a duty on companies domiciled or headquartered within a state's territory (the home state) to prevent human rights violations and environmental harm anywhere in the world they operate. The law is still relatively new and its full impact and effectiveness will become clearer over time. Much will depend on how its requirements are interpreted and implemented in practice and adjudicated by courts. The claim against Total, so far hinging on the question of jurisdiction, forewarns of many battles ahead. Yet, it is indisputable that the law has opened up new avenues for remedy by giving foreign victims of alleged human rights and environmental harm by French companies a new forum to bring their complaints. By June 2021, at least six formal notices had been handed out to French companies by or on behalf of foreign claimants, and 4 of those cases have already been filed.[121] As described in this case, a lawsuit is being pursued jointly with Ugandan claimants against Total, and another judicial claim has recently been launched by foreign indigenous claimants against supermarket giant Casino under the duty of vigilance law.[122] The treaty must seek to crystallise this practice globally with provisions that open up avenues for remedy in home state courts.

The decisions of the first instance and appeal courts to refer the claim against Total to a commercial court reveal a misunderstanding of both the nature and intent of the duty of vigilance law. Just as labour or tort claims against a company do not become commercial disputes because they involve an examination of aspects of the defendant's management systems, as they typically do,

120 | UN General Assembly, 'Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises', A/72/162, 18 July 2017, para 19-20.

121 | The four cases involving foreign plaintifs already brought to court are the ones against Total (Uganda), EDF (Mexico), Casino (Brasil) and Suez (Chile). See CCFD-Terre Solidaire and Sherpa's "Duty of vigilance radar" website: https://vigilance-plan.org/court-cases-under-the-duty-of-vigilance-law/ ; Business and Human Rights Resource Centre, 'France: Analysis on first legal cases filed under enforcement mechanism set out in Duty of Vigilance law', https://www.business-humanrights.org/en/latest-news/france-analysis-on-first-legal-cases-filed-under-enforcement-mechanism-set-out-in-duty-of-vigilance-law/ Another case is currently being heard by the French courts, against Total in relation to its climate obligations, but this case does not involve any foreign plaintiffs.

122 | Novethic, 'Devoir de Vigilance : Casino est poursuivi en justice en France pour son rôle dans la déforestation', 8 March 2021, https://www.novethic.fr/actualite/social/droits-humains/isr-rse/des-peuples-d-amazonie-demandent-reparation-en-justice-au-groupe-casino-pour-manque-de-vigilance-sur-la-deforestation-149603.html

123 | Friends of the Earth France and Survie, 'Total Uganda case in France: the Court of Appeal of Versailles remands the case to the commercial court', 10 December 2020, https://www.amisdelaterre.org/communique-presse/total-uganda-case-in-france-the-court-of-appeal-of-versailles-refers-to-the-commercial-court/ See also, La Croix, 'Devoir de vigilance : la protection des droits humains en péril', 24 June 2020, https://www.la-croix.com/Debats/Forum-et-debats/Devoir-vigilance-protection-droits-humains-peril-2020-06-24-1201101630

the fact that aspects of the dispute with Total concern its internal management practices does not make the case commercial in nature. In addition, the objectives of the duty of vigilance law to protect the environment and human rights make commercial courts, especially those in France which are staffed with representatives of the business sector (non-professional peer-elected judges) utterly inappropriate to resolve allegations of human rights violations or environmental harm.[123] One year after the Nanterre High Court's decision, the very same court ruled that it had jurisdiction to hear another duty of vigilance claim against Total.[124] In October 2021, a legal provision giving exclusive jurisdiction to the civil court of Paris for duty of vigilance cases has been approved by the French Parliament. [125]

The duty of vigilance law is significant in another respect. It fills the accountability gap derived from the fact that, under most legal systems, parent companies and their subsidiaries are considered separate legal entities with their own distinctive duties and liabilities (what is often termed as "separate legal personality"). Parent companies covered by the duty of vigilance law can no longer rely on this doctrine and blame their subsidiaries for human rights violations which they themselves now have a duty to prevent. The same principle is rightly extended to other entities over which a company typically exercises a high degree of control or influence. While not perfect, the duty of vigilance law has begun to chip away at outdated legal concepts and provides a basis for liability that is more in tune with today's economic and commercial realities. The treaty should seek to consolidate and galvanise this practice, making sure that duties of respect and prevention imposed on companies extend throughout their global operations and business relationships . At the same time, norms imposing these duties should not lower existing liability standards or entrench detrimental practices such as the use of human rights due diligence as an absolute defence. The norms should not focus too much on the due diligence processes: during the court hearings on Total Uganda case in France, much of the debate evolved around the vigilance plan, sidetracking the real issues at hand, i.e., the violations currently taking place in Uganda and Tanzania, and the imminent risk of additional violations due to Tilenga and EACOP projects.[126]

In light of the above account, the treaty should:

- Retain provisions in **Art 6.2** concerning the obligation of the state in whose territory a company is domiciled (a home state) to impose on this company a duty to respect human rights and prevent human rights abuses throughout their business activities and relationships.

- Retain the important provisions on liability of a business enterprise for **failure to prevent** others over which it exercises control, management or supervision from causing or contributing to human rights violations or abuses currently reflected in the first part of **Art 8.6** (to capture relationships of control or supervision embodied by the TotalEnergies S.E-Total Uganda and Total S.E./Total Uganda-Atacama Consulting relationships).

- Retain the welcome first line of **Art 8.7** referring to human rights due diligence not acting as an automatic defence, but eliminate the second line referring to compliance with applicable human rights due diligence standards as it appears to contradict, and might defeat the purpose of the first line.

- Add to **Art 8.6** the clarification that any provisions on liability based on due diligence failures are in addition, and without prejudice, to existing liability regimes that may impose stricter or alternative grounds of liability.

- Retain provisions under **Art 9** on **Adjudicative Jurisdiction** that establish the jurisdiction of the courts of a place where a company is domiciled to hear civil claims against it (to allow claims against foreign companies in their own home states). However, to avoid all doubt, clarify in **Art 9.1 that the alleged violations include those attributed to the business relationships including entities in the value chains of the company, and** that this jurisdiction is applicable not only in cases of alleged causation and/or contribution, but also in **failure to prevent** cases as per **Art 8.6**.

- Establish the right of interested parties to be guaranteed access to **competent and independent authorities** to effectively adjudicate on their claims in the context of business activities [127] (to rule out tribunals that, like the French commercial courts, do not have the requisite expertise to hear human rights and environmental claims). This could be added to the list of rights under Art 4 on Rights of Victims or be inserted into **Art 4.2(c)** or **4.2(d)**, the latter potentially reading as follows: "be guaranteed the right to submit claims… to courts and **other competent and independent authorities** of the State Parties (eliminating the reference to "non-judicial grievance mechanisms")

A NOTE ON GAS-FLARING, FOREIGN COMPANIES AND LIABILITY

The villages of Kasenyi and Kakindo, in Buliisa district, were affected by gas-flaring during Tullow Oil's well-testing works in 2009. These activities produced emissions, strong smells, loud noises and disruptive lights which allegedly led to many adverse health impacts such as miscarriages, impaired vision, loss of hearing, coughing and other respiratory complaints.[128] Local villagers also alleged damage to arable land and loss of animals as a result of the gas-flaring and associated explosions.[129] Open gas-flaring is known to be harmful to the environment and nearby communities, and Tullow Oil only started using the safer technique of enclosed gas flaring in 2010. During its well-testing work, Tullow Oil was operating as a contractor to Uganda's Ministry of Energy and Mineral Development, which supervised and approved Tullow Oil's work programme.[130] As of today, the alleged harms remain unaddressed, and Tullow Oil has now sold all its interest in the project.

This case raises two important issues for the treaty. Firstly, the role and responsibility of the state as buyer of goods and services and, secondly, the ability of affected people to pursue remedy against foreign companies that sell their assets and leave the country. To address the first issue, the treaty should incorporate provisions on state obligations in the context of public procurement. In relation to the second issue, two measures are critical. Firstly, claimants in an ongoing lawsuit against a foreign company should be able to use asset freezing injunctions to prevent the disposal of assets (such as shares) by the defendant and in this way ensure that any favourable court decision can be satisfied against these assets. Secondly, claimants should always be able to sue the foreign company in its home state courts (see recommendations above) and to implement a favourable court decision against its assets wherever in the world these are located. As discussed above, the third revised draft treaty already establishes in **Art 9** the jurisdiction of home state courts to hear claims against domiciled defendants (permitting potential claims

124 | Sherpa et al, 'Climate change litigation against Total: a first victory for the NGOs and local authorities', 11 February 2021, https://www.asso-sherpa.org/climate-change-litigation-against-total-a-first-victory-for-the-ngos-and-local-authorities Based on the Uber judgment, rendered by the Cour de Cassation on 18 November 2020, the court considered that as "non-traders", the claimants have a right of option between the judicial and commercial courts. The court also found that while the vigilance plan undoubtedly affects Total's operations, its purpose goes far beyond the framework of the company's management, to address issues of concern to society as a whole, and therefore rightfully within the scope of judicial review. See Sherpa, 'First court decision in the climate litigation against Total: A promising interpretation of the French Duty of Vigilance Law, https://www.asso-sherpa.org/first-court-decision-in-the-climate-litigation-against-total-a-promising-interpretation-of-the-french-duty-of-vigilance-law

125 | See article 34 of the bill on the "confidence in the judicial institution" and its impact assessment, pages 348-355 https://www.assemblee-nationale.fr/15/pdf/projets/pl4091-ei.pdf This article was adopted by the French National Assembly in May 2021, and examined by the Senate in September 2021. https://www.amisdelaterre.org/communique-presse/attribution-de-la-competence-aux-tribunaux-judiciaires-les-parlementaires-sauvent-lesprit-de-la-loi-sur-le-devoir-de-vigilance/

126 | Total Uganda – A first lawsuit , p. 6

127 | As provided for by multiple international human rights instruments, including the Universal Declaration of Human Rights (art 8 and 10) and the International Covenant on Civil and Political Rights (art 2.3 and 14).

against Tullow Oil in the UK and also against Total in France, for example, on theories of successor liability as Total has bought Tullow Oil's shares in Tilenga project [131]). It also addresses the recognition of foreign judgements in **Art 12.10** (which would permit, among other things, enforcing the foreign judgement against the assets of the defendant in the requested jurisdiction) and contemplates the freezing of assets as a measure of mutual legal assistance in cross-border litigation under **Art 12.3(a)**. However, asset freezing mechanisms should also be available in the context of domestic litigation to avert the risk of foreign companies that are being sued domestically selling their assets and making the enforcement of court decisions against them much more difficult.

To address the two issues highlighted above, the treaty should:

- Add a new provision under **Art 6** on **Prevention** designed to deal with the "State-Business Nexus" and include, among others, an obligation of the state to ensure respect for human rights by business enterprises that provide goods and services to the State as a condition for both entering and maintaining their procurement contracts.

- Add a provision requiring states to ensure the availability of asset freezing mechanisms to guarantee the effective enforcement of court decisions against business enterprises. This could be included in **Art 8.4** which deals with the state obligation to ensure reparations, in **Art 4** on **Rights of Victims** (which already refers to injunctions) or in a separate, stand-alone paragraph under **Art 6** dealing with the obligation of the state to guarantee precautionary measures more broadly.

128 | New oil, Same Business? p 83, 101.

129 | New oil, Same business? p 85, 101.

130 | New oil, Same Business? p 83.

131 | A legal doctrine by which the buyer of assets can be held liable for the liabilities of the seller.

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