

TOTAL UGANDA

**A first lawsuit under the duty
of vigilance law: an update**



In June 2019, six organisations – Friends of the Earth France, Survie (France), AFIEGO, CRED, NAPE/Friends of the Earth Uganda and NAVODA (Uganda) – issued a formal notice to French oil corporation Total, informing it that its mega oil project in Uganda and Tanzania failed to comply with the company's legal obligations to prevent human rights violations and environmental harm.

After Total rejected these accusations outright, our organisations filed a lawsuit against the company in October 2019. **This is the very first legal action of its kind under France's new law on the "duty of vigilance of parent and outsourcing companies"** which makes parent companies of transnational corporations legally accountable for the impacts of their operations all over the world.

The law was enacted on 27 March 2017 after a monumental uphill battle, with lobby groups doing everything

within their power to prevent the law from coming into force. The efforts of these groups did, however, succeed in delaying its adoption, and resulted in a watered-down version of what was originally intended. The law contains several limitations, which we identified with our partners when the law was adopted¹, and which have been confirmed in practice by the legal proceedings currently underway.

Before the hearing at the Versailles Court of Appeal, it seems pertinent to take stock of these first legal proceedings under the new law. This briefing, which provides an updated analysis of the case, also shows that over a year after we issued a formal notice to Total, and despite its new vigilance plan, published in Spring 2020, we believe that the oil transnational still fails to comply with its legal obligations under this law.

A LEGAL TIMELINE





OBLIGATIONS UNDER THE DUTY OF VIGILANCE LAW

Under the law, large corporations headquartered in France (over 5,000 employees in France or 10,000 worldwide) are required to observe vigilance in order to identify risks and prevent severe impacts on human rights and fundamental freedoms, the health and safety of persons, and the environment, resulting from their own operations, from the operations of the companies they control directly or indirectly, as well as from the operations of the subcontractors or suppliers with whom they maintain an established commercial relationship.

The law stipulates that French transnational corporations must **establish and publish a “vigilance plan”** which identifies risks of human rights violations and environmental harm in their operations as well as the concrete mea-

sures taken to prevent severe violations of these rights and mitigate risks in their operations worldwide. In addition, they must, more importantly, **effectively implement these measures**; that is, ensure they are effectively implemented across all their operations, including those undertaken by their subsidiaries, subcontractors and suppliers around the world.

It should be noted that **the requirement to observe vigilance is independent from the duty to publish a vigilance plan**. In other words, publishing a vigilance plan does not mean that the company has complied with the law. **The vigilance plan is only a document which disclose publicly the vigilance measures undertaken by the company**. The plan, as well as its implementation report, must be published in the annual management report [“*rapport de gestion*”], so these are easily accessible.

THE VIGILANCE PLAN MUST INCLUDE



Risk mapping
that identifies, analyses
and ranks risks



Procedures to regularly assess, in accordance
with the risk mapping,
the situation of subsidiaries,
subcontractors or suppliers



Appropriate actions
to **mitigate risks or prevent
serious violations**



**An alert and complaint
mechanism** relating to
potential or actual risks,
drawn up in consultation
with the trade union
organizations



A scheme for monitoring
the implementation
of measures and evaluating
their effectiveness

Tribunal de grande instance



If a company fails to meet its obligations, legal action may be taken. After concluding that not only was Total's vigilance plan inadequate, but also that its meagre content had not been effectively implemented, we took action in 2019⁹. **We are therefore asking the court to order Total to put an end to the ongoing violations, to change its vigilance plan so that it prevents any future violations and to effectively implement this new plan.**

Total has rejected our accusations and maintains that its vigilance plan complies with the law¹⁰. It published a new vigilance plan in March 2020¹¹. Although at first glance this plan appears more substantial, a more in-depth reading reveals that the additional information primarily concerns internal procedures and processes, and that **three years later, the shortcomings in Total's first vigilance plan are still present in its most recent plan**¹². The crucial components of the plan – identifying risks and proposing vigilance measures – remain totally incomplete.

TOTAL'S FAILURE TO COMPLY WITH THE LAW

Shortfalls in its vigilance plan

Despite the fact that the group is active in "over 130 countries in a variety of complex economic and socio-cultural contexts" and in several different business areas¹³ Total's vigilance plan only identifies six risks of severe impacts on human rights and fundamental freedoms and three risks of severe impacts on health, safety and the environment¹⁴:

Generic risks of severe abuses identified by Total:

on human rights and fundamental freedoms:

- risk of forced labour;
- risk of discrimination;
- risk of non-compliance with fair and safe working conditions;
- risks related to the resettlement of neighbouring local communities;
- risks of impacts to the right to health of local communities;
- risk of disproportionate use of force.

on health, safety and the environment:

- risks resulting from a major industrial accident on an offshore or onshore site;
- risks related to the life cycle of the products manufactured, and to the substances and raw materials used;
- risks associated with transportation.

These risks are described in general terms and are neither analysed nor ranked as explicitly required by the law. There is no mention of specific places or operations related to each risk, of the severity of the impact or its likelihood of occurring. Nor is there any mention of the countries or projects particularly at risk. **It could, therefore, be the vigilance plan of any oil company.**

For example, the vigilance plan refers to *“risks related to the resettlement of neighbouring local communities, resulting from the Group requiring, for some of its projects, temporary or permanent access to land that might result in the physical displacement and relocation of these groups and/or limitation of access to their means of subsistence”*¹⁵, but fails to mention the countries or projects where these risks are greatest. **The Tilenga and EACOP projects, affecting over 100,000 people, are the kinds of projects that should be explicitly dealt with in the plan.** This is particularly important given that these two projects entail several other generic risks listed by Total (risk of disproportionate use of force, all the risks on health and the environment, etc.).

As the risks are not specifically identified, it is impossible to implement effective vigilance measures. Total’s vigilance plan **contains no specific measures to prevent or mitigate the identified risks**, when it should be addressing each risk in detail¹⁶. There is, for example, no mention of measures aiming to prevent the displacement of communities or prevent limitations of access to their means of subsistence.

Risk mapping is the cornerstone of the vigilance plan, and yet **it would seem that Total’s strategy involves deliberately leaving all details out of its mapping**, making it impossible to assess the risks involved, so that no vigilance measures are required nor need to be described in the plan.

Lack of effective implementation and evaluation of the effectiveness of vigilance measures

Duty of vigilance is not an abstract obligation. Concrete measures must be put in place. In order to ensure that the measures are not just a list compiled in a vigilance plan, the law requires the companies concerned to effectively implement these measures and to publicly report on them. Companies must thus present an annual report detailing the way in which the various measures have been implemented. The law also requires that they set up a monitoring mechanism to assess how effective they are.

This implementation report must clearly state whether the measures listed in the plan have been effectively implemented by the company, as well as by **its subsidiaries, suppliers and subcontractors**. If the measures have not been effectively implemented, the report must state

the difficulties encountered in applying these measures. It should also **explain whether the measures have been effective** and enabled meeting the objectives for each of the identified risks. Lastly, the vigilance plan should also include a schedule and indicators so that the effectiveness of measures may be monitored.

Unfortunately, neither Total’s vigilance plan nor its implementation report include such information. **Total does nothing more than describe various internal processes** aiming to raise awareness of issues related to human rights, fundamental freedoms and the environment. There is no mention of specific indicators to assess the effectiveness of mitigation or prevention measures. Moreover, the reports fail to include any information on the results of such assessments or monitoring procedures.

Total’s 2019 vigilance plan report (published in 2020) now contains a box mentioning certain problems encountered under the Tilenga and EACOP projects, as well as some related to its mega gas project in Mozambique. It also provides a list of Total’s responses¹⁷. The company states, for example that *“verifications were carried out by TOTAL teams and an independent analysis was conducted in November 2019 at TOTAL’s request. These revealed that the Subsidiary had followed procedures put in place by the Group.”* However, **as this independent analysis has not been made public, we are unable to assess its validity** or evaluate its conclusions against the realities that we have witnessed on the ground.

These are the only concrete details provided in the report. And yet, according to Total, this was chosen *“as an example”*, in response to *“questions raised by external stakeholders”*¹⁸. It does not constitute an implementation report because it does not establish a link between the risks identified in the plan and the measures taken to mitigate risks or prevent severe violations. In addition, **a vigilance plan and accompanying report should not just be about responding to civil society criticism**: they should be exhaustive, specific and detailed, and clearly address the risks identified in the mapping as well as the measures to mitigate and prevent these risks.

AN INTERPRETATION OF THE LAW TOO FOCUSED ON THE VIGILANCE PLAN

A system that fails to do what it's supposed to

The goal of the vigilance plan is to oblige companies subject to the new law to publicly report on the risk prevention and mitigation measures they are taking in order to meet their new legal obligation to observe vigilance, and to illustrate, by way of an annual report, that these measures are being effectively implemented. The information published by the companies concerned should enable stakeholders and courts of law to assess whether the actions taken address the identified issues, i.e., whether or not they are effective in preventing human rights violations and environmental harm.

Information published in the plans and the reports on how it was effectively implemented **should also serve to lighten the burden of proof**, which always falls on the affected communities as well as the civil society organisations or unions that support them. Claimants are required to illustrate how the plan fails to comply and/or is inadequately implemented, and when they are claiming for damages, they must also show a direct relationship between these non-compliances and the violations committed.

However, **the vigilance plans of the corporations subject to the law are either non-existent or wholly inadequate¹⁹**, as illustrated in the case of Total above. They do not, therefore, meet the requirements of the law, and fail to provide the information that would enable assessing whether or not their vigilance measures are effective.

Worse still, as illustrated in the legal arguments of the parties at the Nanterre Court hearing last December, **the court proceedings focus on the vigilance plan** and the interpretation of what it should contain, **sidetracking the real issues at hand, i.e., the violations currently taking place in Uganda and Tanzania**, and imminent risk of additional violations due to Total's mega oil project.

The Nanterre Court's ruling reflects an excessive focus on the plan

The Nanterre Court was also focussed on the company's obligation to publish a vigilance plan, and its place in the company's management report. According to these judges, issues related to the vigilance plan are directly linked to the company's management, and therefore any questions regarding its compliance with the duty of vigilance law should be addressed to the commercial court (specialised civil jurisdiction) and not to the civil court (general civil jurisdiction).

We argue, however, that **this reasoning is based on an inaccurate interpretation of the law**, and goes directly against case law established by the French Court of Cassation (French Supreme Court). The Nanterre Court deems that the commercial court is the competent court because there is a relationship between the facts pertaining to the dispute (Total's compliance or non-compliance with its obligation to observe vigilance) and the management and overall running of the company. However, case law regarding the jurisdiction of the commercial court on management issues always refers to breaches attributed to individuals (de facto or de jure directors of a commercial company) and not to legal persons (the companies themselves). **The Nanterre Court's interpretation of the**

BURDEN OF PROOF

Early versions of the duty of vigilance law sought to reverse the burden of proof – a key component of the law which big business lobby groups managed to get wiped during the law adoption process. This would have meant that the companies involved would be charged with proving that they are not accountable for the acts of which they are accused, thus establishing a form of procedural equality between those affected and the corporations.

Without a reversal of the burden of proof, legal action against these companies remains an uphill battle. It is extremely difficult for both the affected communities and civil society to gather the legal evidence required to prove that the corporation is legally accountable, as a lot of the key information is held by the corporation itself. And it is even harder when these companies operate in other countries. Added to this are the difficulties and dangers involved in gathering proof and witness statements in a country like Uganda.

law would therefore suggest that commercial courts have a much wider jurisdiction than they actually do, even though they are courts of limited jurisdiction. With that reasoning, what legal action against a company is not related to its management or the way it is run?

It is important to remember that France's commercial court is a special court where representatives of the business world (non-professional peer-elected judges) may rule on commercial disputes. The present case is about serious human rights violations and environmental harm. It therefore appears totally unrealistic to think that the commercial court is the right jurisdiction to order Total to take the necessary measures to put an end to these violations.

These procedural issues are all slowing down the process considerably when there is an urgent need to address the real issues of the dispute. **Total, moreover, is profiting from these delays.** The company has still done nothing to change its practices in Uganda and Tanzania, and it is **the affected communities that are bearing the brunt** of their operations. We argued, in 2019, that several thousands people had lost their means of subsistence. Our recent investigation²⁰ and those of other organisations²¹ now illustrates that tens of thousands of people have been awaiting compensation for more than two years. Total's Tilenga and EACOP projects have made them completely destitute, with the land on which they depend for their survival taken from them.

NOTES

1 See [here](#) for more information on France's duty of vigilance law, and the report by Friends of the Earth France and ActionAid France, *End of the Road for Transnational Corporations?*, October 2017.

2 See our [press release](#) of 25 June 2019 and [press kit](#) (both in French).

3 See Total's [reply](#) and our [press release](#) of 26 September 2019 (in French).

4 See our [press release](#) of 23 October 2019.

5 See our [press release](#) of 12 December 2019.

6 This new type of court merges a court of first instance and a high instance court. See [here](#) for more information.

7 See our [press release](#) of 30 January 2020 (in English) and the [ruling of the Nanterre Court](#) (in French).

8 See our [article](#) of 25 March 2020, following which [Total requested a right of reply](#) (both in French).

9 See our [press release](#) of 23 October 2019.

10 See replies from [Total SA](#) and [Total E&P](#) to the communication report made by the UN Special Rapporteurs, as well as our analysis of these replies.

11 Total, [Universal Registration Document 2019](#), Vigilance Plan, pp.102-111 published 23 March 2020 (hereinafter "Total's 2019 Vigilance Plan").

12 Total has published three vigilance plans since the duty of vigilance law was adopted in 2017: the first vigilance plan published in 2018, in its [Universal Registration Document 2017](#), pp 96-102; the second was published in 2019 in its [Universal Registration Document 2018](#), pp. 93-98 (see also the implementation report pp. 98-110); and the third in 2020,

in its [Universal Registration Document 2019](#), Vigilance Plan, pp. 102-111 (see also the implementation report pp. 111-127). Criticism of Total's 2017 and 2018 vigilance plans is compiled respectively in the report by ActionAid France, Friends of the Earth France, Amnesty International France, CCFD-Terre Solidaire, the Ethique sur l'étiquette collective and Sherpa, *Duty of vigilance – Year 1 : Companies must do better*, February 2019, and in the report by Friends of the Earth France and Survie, *Serious breaches of the duty of vigilance law : the case of Total in Uganda*, October 2019.

13 Total, [Universal Registration Document 2019](#), p. 102.

14 Total's 2019 Vigilance Plan, pp. 104-105.

15 Total's 2019 Vigilance Plan, p. 105.

16 Total's 2019 Vigilance Plan, pp. 107-108 and 109-110.

17 Total's 2019 Vigilance Plan, pp. 112-113.

18 Total's 2019 Vigilance Plan, p. 112.

19 ActionAid France, Friends of the Earth France et al, op.cit. See also CCFD-Terre Solidaire and Sherpa's [Duty of Vigilance Radar](#).

20 Friends of the Earth France and Survie, *A Nightmare Named Total – An Alarming Rise in Human Rights Violations in Uganda and Tanzania*, October 2020. French version [here](#), English version to be published in November 2020.

21 See Oxfam America, GRA, CRED and NCEE, *Empty Promises Down the Line ? A Human Rights Impact Assessment of the East African Crude Oil Pipeline*, September 2020; and FIDH and FHRI, *New Oil, Same Business? At a Crossroads to Avert Catastrophe in Uganda*, September 2020.

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Friends of the Earth France is a non-profit environmental and human rights network, independent from any religious or political influence. Created in 1970, it helped build the French ecological movement and helped found the world's largest grassroots environmental network, Friends of the Earth International, with groups in 75 countries and over two million supporters around the world.

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Created 35 years ago, the NGO **Survie** analyses the French African news and stands up against "Françafrique", the special name given to French imperialism in Africa, that the NGO has brought to light. It denounces all types of French neo-colonial interventionism in Africa, and works to change French politics in Africa and to bring together all citizens who want to inform themselves and take action.

With about 1,300 members and local groups in twenty French cities, the NGO regularly publishes analysis in leaflets, books as well as undertaking advocacy work and legal action.

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