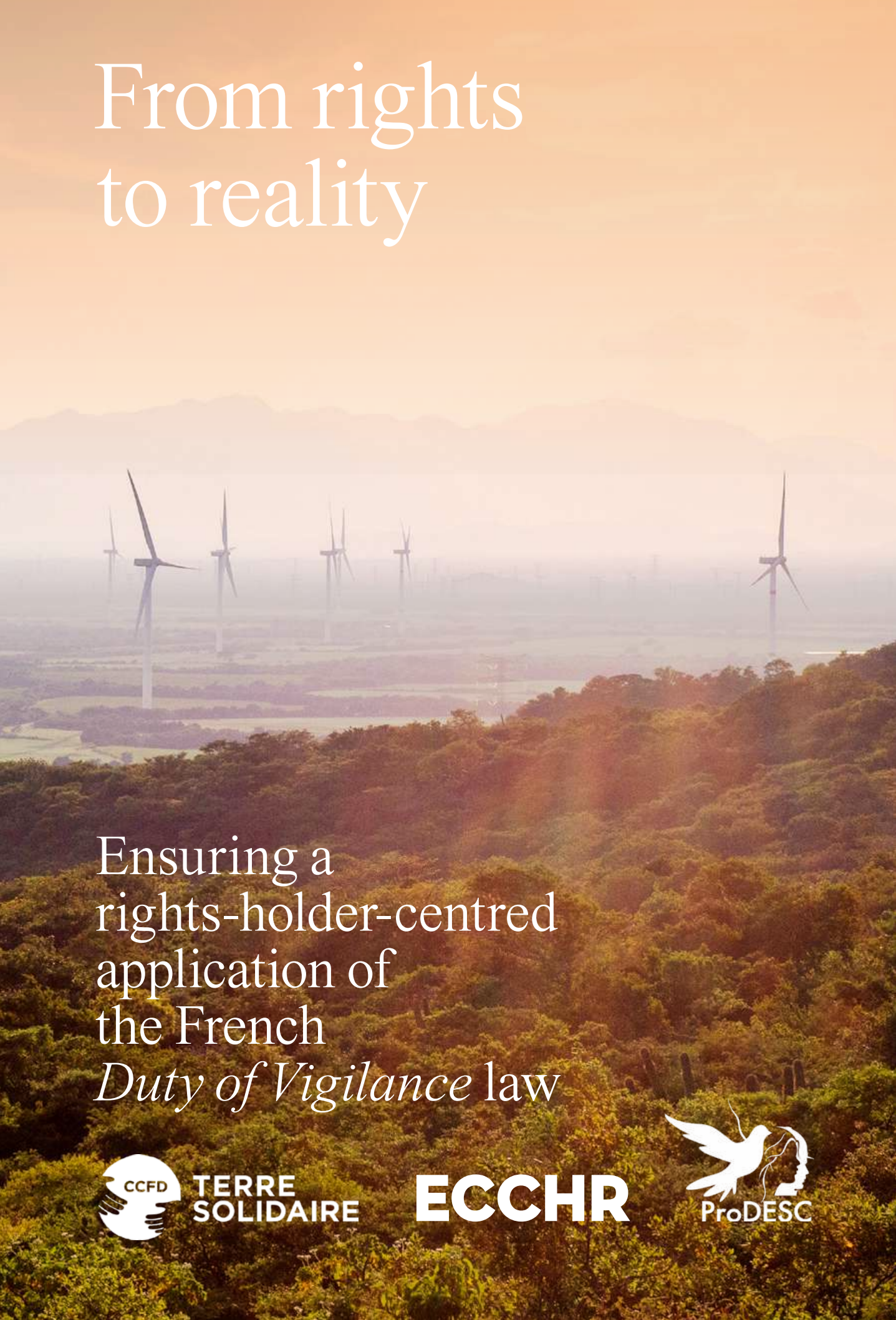
From rights to reality



Ensuring a rights-holder-centred application of the French *Duty of Vigilance* law

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FROM RIGHTS TO REALITY

ENSURING A RIGHTS-HOLDER-CENTRED APPLICATION OF THE FRENCH DUTY OF VIGILANCE LAW

EARLY LESSONS LEARNED FROM UNIÓN HIDALGO V EDF

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CONTENT

Introduction

There is a growing, global movement to combat corporate impunity for human rights violations in transnational business operations. The introduction of mandatory human rights due diligence legislation is an important step forward, representing a long-awaited shift away from the prevailing voluntary "corporate social responsibility" approach towards "hard law" obligations regulating corporate respect for human rights and the environment. Laws enshrining these obligations have now been adopted or are under consideration in several countries. In parallel, developments at European level around the proposed Corporate Sustainability Due Diligence Directive and ongoing negotiations on a proposed UN treaty on business and human rights seek to establish a comprehensive legal framework for business and human rights.

France has paved the way in this regard, having introduced the Duty of Vigilance law (hereinafter the "LdV") in 2017. The law establishes a first-of-its-kind legal mechanism that imposes a binding obligation on the largest French companies to identify and prevent human rights and environmental impacts resulting from their activities and within their supply chains. Crucially, the law enshrines a process through which communities and individuals affected by harmful corporate practices can access transnational legal avenues for prevention and redress. The purpose of mandatory human rights due diligence legislation is to protect people and planet from harmful corporate activities. However, the extent to which both existing and anticipated legislation can adequately reflect the reality of business impacts on rights-holders—and effectively mitigate this harm—is increasingly under debate. Notably, legislative gaps and ambiguities risk creating loopholes for corporations to evade their responsibility, and restricting access to justice.

Five years after the LdV entered into force, it is unclear whether its adjudication and interpretation by French courts will support it to become a meaningful legal tool that comprehensively and effectively regulates the human rights and environmental impacts of French multinational corporations. Although a growing number of cases have been filed, the ability of individuals and communities to assert their rights under the law appears to be increasingly out of reach.

The LdV has an extraterritorial scope, imposing a vigilance obligation on French companies with respect to their global operations. Cases alleging the violation of the vigilance obligation will be based on activities and impacts that cannot be detached from the context in which they have occurred—whether cultural, legal, religious or political. This principle is the foundation of this report: that the implementation of the LdV necessitates a teleological and *in concreto* interpretation of the vigilance obligation centred on the rights and the realities of those that the law seeks to protect.

This report focuses on a case brought before French civil courts by members of the Unión Hidalgo community in Mexico against the energy company Electricité de France (EDF). The case alleges that EDF, a company partly owned by the French state, violated its vigilance obligation by failing to adequately identify and prevent the risk of human rights violations resulting from the development of a wind farm on Indigenous land. Impacted community members, in collaboration with Mexican NGO ProDESC and ECCHR, have sought to use the LdV to prevent further violations of their physical integrity, right to free, prior and informed consent, and right to land, as well as to access remedy for harm.

> Legislative gaps and ambiguitiesrisk creating loophopes forcorporations to evade their responsibility

The rights violations experienced by the land and human rights defenders in this case epitomise the reality of corporate harm, particularly in the extractive industry. Yet the considerable legal and procedural hurdles faced by the claimants highlight the current challenges in effectively enforcing the LdV. Notably, the difficulty in interpreting and implementing the vigilance obligation in an Indigenous rights context, where collective land rights and protections recognised under international law are infringed by the activities of multinational corporations seeking to gain access to land for extractive projects.

The Unión Hidalgo case is also significant outside of the French legal context. As more mandatory human rights due diligence laws are introduced across Europe it will become increasingly important for legal systems to recognise and adjudicate allegations of extraterritorial corporate harm based on violations of international human rights standards. Should European courts be unwilling or unable to recognise human rights protections afforded to people and the environment in the countries in which multinational corporations operate, they will neither be able to grasp the reality and needs of those affected by failures in human rights due diligence, nor to ensure a thorough prevention and reparation of human rights violations along global value chains.

The objective of this report is to provide reflections from the Unión Hidalgo case, offering recommendations to help shape the future content, interpretation and ultimately meaningful enforcement of mandatory human rights due diligence laws. In France, this role will be played by courts and judges adjudicating on cases filed under the LdV. At European level, policymakers have the opportunity to reflect on the challenges faced by communities in the Global South to assert their rights under existing mandatory human rights due diligence laws, in order to ensure that new legislation enshrines effective accountability and remedy mechanisms.

The vigilance obligation

A legal mechanism to prevent harm to people and planet

The legislative process to introduce the LdV was triggered by the collapse of the Rana Plaza factory in Bangladesh in 2013 which claimed 1,134 lives and left thousands injured.[1] The disaster laid bare the failures of voluntary corporate self-regulation to prevent human rights violations in the globalised economy. Fostered by a remarkable coalition of trade unions, civil society organisations and parliamentarians, the proposal for a mandatory human rights due diligence law in France was premised on developing a meaningful legal mechanism through which communities, individuals and the environment could protect themselves against harmful corporate practices and obtain remedy when rights violations occurred. In her report before the Assemblée Nationale as the first draft of the Law was proposed, the French MP Danielle Auroi emphasised the ambition of the legislation:

"The aim is to protect the victims of human rights violations perpetrated by economic actors. This obligation should therefore be imposed in order to avoid serious risks of loss, upstream of the harmful event, or serious damage, downstream of it. These risks or damages are therefore potentially generated by actors who conduct activities that put human rights at risk (extractive industries, for example)…It is now a question of establishing preventive measures and, if necessary, ensuring better access to justice for victims in the event of serious damage, in line with French and European commitments to protect fundamental rights and the environment. We can only hope that this humanist resolution, in line with the values that France has held in the world since 1789, will be shared by all Republicans on all benches of the National Assembly, as it is already shared by a large number of French companies in all countries where they operate."[2]

The introduction of the LdV in 2017 was a game-changing moment for the business and human rights movement. It was the first law to enshrine the concept of human rights due diligence as defined in the United Nations Guiding Principles on Business and Human Rights (UNGPs), the globally recognised framework to prevent and address business-related human rights impacts. Understood as a way for enterprises to proactively manage potential and actual adverse human rights impacts with which they are involved, human rights due diligence involves four core components:

A Identifying and assessing actual or potential adverse human rights impacts that the enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;

1 Delalieux, G. (2016). Devoir de vigilance. *Revue Projet,* 352, 78
2 Report n° 2504 of the Commission des lois de l'Assemblée Nationale, p.6

B Integrating findings from impact assessments across relevant company processes and taking appropriate action according to its involvement in the impact;

C Tracking the effectiveness of measures and processes to address adverse human rights impacts in order to know if they are working;

D Communicating on how impacts are being addressed and showing stakeholders—in particular affected stakeholders—that there are adequate policies and processes in place.[3]

The implementation of human rights due diligence by corporations has been hindered by the "soft law" nature of the UNGPs. The introduction of the LdV marked a turning point, by crystallising this obligation into a binding duty of care, creating "harder-edged legal duties" at domestic level for parent companies with regard to their subsidiaries, subcontractors and suppliers both at home and overseas.[4]

The LdV is structured around two mechanisms. First, the creation of the vigilance obligation that requires the largest French corporations to identify risks and prevent severe violations of human rights and fundamental freedoms, health and safety of persons and the environment resulting from their activities and value chain. Second, where reasonable measures have failed to prevent harm, affected parties can seek reparations for damage caused as a result of the failure to respect the duty of vigilance.[5]

Central to the duty of vigilance is the obligation for companies of more than 5,000 employees in France or 10,000 in France and abroad to establish, implement and publish a "vigilance plan" covering its own activities and those of its controlled subsidiaries, subcontractors, and suppliers. The vigilance plan should first identify, analyse and map the risks arising from the company's activities. Secondly, it must put forward suitable mitigating measures to address these risks. Thirdly, the plan must be published within the annual report, and a report on its effective implementation must be provided by the company concerned by the obligation.[6]

When a company fails to respect its vigilance obligation, any party with standing—affected persons, as well as non-governmental organizations, trade unions or public municipalities—can formally notify ("mise en demeure") the company to comply with its vigilance obligation. If the company does not comply within three months, the parties can request the competent judge to issue an injunction against the company to comply with its vigilance obligation. This injunctive relief mechanism and the civil liability provision contained within the law therefore establishes a robust corporate accountability regime to incentivise the prevention of human rights and environmental harm.

3 UN General Assembly, *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises,* UN Doc. A/73/163 (2018)
4 C Macchi, C Bright, "Hardening soft law: the implementation of human rights due diligence requirements in domestic legislation" in *Legal Sources in Business and Human Rights* (ed), 2020, 218.
5 M Caillet, M Guislan and T Malbrand, *La vigilance sociétale en droit français* (December 2016), Ritimo, coll.Passerelle (ed.) p.14
6 French Commercial Code, Art. L. 225-102-4 I, resulting from Law No 2017-399 of March 27,2017 on the Duty of Vigilance

Rights v reality

Unión Hidalgo and the challenges of applying the *Duty of Vigilance* law in an Indigenous rights context

Despite its lofty goals, the question of whether and how the LdV will result in substantive improvements for the individuals and communities negatively impacted by the activities of French companies requires critical reflection. So far, analysis of company vigilance plans by civil society groups has consistently highlighted gaps in compliance with the LdV, including a number of companies that have failed to publish a vigilance plan.[7] An evaluation of the implementation of the LdV by the French Ministry of the Economy and Finance in 2020 found that too many companies understood the vigilance obligation as a way to protect their own interests and reputation, rather than protecting those harmed by their activities.[8] Furthermore, as this report highlights, inconsistencies and ambiguities within the law itself have created significant barriers to its effective implementation.

These issues are exemplified in the energy and extractives industry, which has long been associated with human rights and environmental abuses. Oil, gas and mining companies developing extractive projects in resource-rich countries in the Global South can have adverse impacts on a broad array of human rights, including displacement of communities, impacts on land, water and housing, environmental pollution and attacks on human rights defenders. Many of these projects take place on lands inhabited by Indigenous peoples, who not only rely on the land for shelter and subsistence, but also have a deep cultural connection to the land as the foundation of collective processes and rights, such as property. Yet groups that have been negatively affected by the activities of French energy companies have faced significant challenges in asserting their rights under the LdV, to challenge exploitative practices as violations of the vigilance obligation and to prevent further harm. Two of the first cases filed under the law—against multinational energy companies Electricité de France (EDF) and TotalEnergies (Total)—highlight the significant gaps between the intention of the law and the reality of its implementation, and underscore the importance of ensuring that the vigilance obligation is enforced in a way that upholds the rights of those harmed by business activities.

7 See for example CCFD Terre Solidaire, "Plans de vigilance: les entreprises jouent-elles le jeu ?", 2 February 2023 https://ccfd-terresolidaire.org/plans-de-vigilance-quoi-de-nouveau-dans-le-radar/
8 A Duthilleul, M. de Jouvenel, *Evaluation de la mise en œuvre d la loi no 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre* (January 2020) p. 34

UNIÓN HIDALGO V EDF: CHALLENGING INDIGENOUS RIGHTS VIOLATIONS IN THE WIND FARM INDUSTRY

The shift towards renewable sources of energy over the past decade has increasingly come at the cost of human rights. In Latin America in particular, a growing number of social and environmental abuses have been recorded in the hydroelectric, wind and solar industries.[9] Renewable energy projects such as wind farms are being developed on Indigenous lands and territories, resulting in systematic violations of human rights of Indigenous communities.[10]

In 2013 the Mexican government opened up its renewable energy market to private foreign investment. Since then, European energy companies have sought to capitalise on the extensive wind power in the region, investing billions into wind energy projects to create the largest wind farm corridor in Latin America located in the Isthmus of Tehuantepec.[11] The activities of these companies have been linked to serious human rights abuses including the violation of Indigenous rights to land and territory. In many instances, the construction of wind power installations has also led to violence and attacks against land and human rights defenders opposing the encroachment of private enterprises onto commonly held land without their consent.[12] Despite being carried out on their lands, Indigenous communities have been excluded from the financial and social benefits of these projects, becoming further marginalised at the expense of private land owners and the government.

EDF, the largest French energy company that is majority owned by the French State,[13] has invested in the development of several wind farms in the Oaxaca region, operating via its local Mexican subsidiary Eólica de Oaxaca. In 2015, EDF started negotiations to develop the Gunaa Sicarú wind park on the land of Unión Hidalgo. Unión Hidalgo is an Indigenous community of around 14,500 people that self-identify as Zapotec. According to Mexican law, Unión Hidalgo's land is collectively held as part of the *comunidad agraria* (agrarian community) which requires that any decision relating to the use of the land must be taken by a community assembly.

However, this process did not take place within the framework of the development of the project by EDF. Instead, usufruct contracts were negotiated and concluded between Eólica de Oaxaca and individual community members acting as private landlords. By 2017, EDF had secured an energy supply contract and signed a memorandum of understanding with the Oaxaca state government on the construction of the wind farm—all in the absence of any prior appropiate consultation of Unión Hidalgo community members.[14]

9 Business and Human Rights Resource Centre, *Renewable energy (in)justice in Latin America* (August 2021) p.4
10 Ibid
11 Observatorio de Multinacionales en América Latina, "The Wind Farm Corridor on the Isthmus of Tehuantepec" https://multinationales.org/IMG/pdf/enco_iberdrola_def.pdf
12 Peace Brigades International Mexico, *Wind Farms and Concerns about Human Rights Violations in Oaxaca* (March 2014)
13 As of 2022 the French government held, via the Agence des Participations de l'État (APE), 83.6% of the capital of EDF, with a shareholder commitment of around 25 billion euros. This represents approximately 40% of the portfolio held by the APE—the public agency that manages the French government's public shareholding strategy as a "shareholder entity"
14 For further details on the case, see ECCHR, ProDESC, CCFD Terre Solidaire, Case report (November 2020)

Members of the Unión Hidalgo community challenged the legality of the wind farm project using domestic legal proceedings based on the violation of their right to free, prior and informed consent. A formal consultation process was initiated by the Mexican government in 2018. Since then, however, community members have faced increasing levels of violence, attacks and threats as a result of their opposition to the project.[15]

As a French company, EDF has an obligation under the LdV to identify risks, and to prevent and remedy violations of human rights and serious environmental damage with regard to its activities and those of its subsidiaries, suppliers and subcontractors. In addition, as a company partially owned by the state, the French government also has a responsibility to address these violations of international human rights (see page 28). Faced with continued violations of their rights and escalating violence, members of the Unión Hidalgo community decided to pursue legal action against EDF in France. In 2019 they issued a notice with the support of the Mexican human rights organisation ProDESC and the European Center for Constitutional and Human Rights, requesting that EDF comply with its vigilance obligation by implementing appropriate measures to prevent human rights violations associated with the Gunaa Sicarú project. After EDF rejected these allegations, in October 2020 the groups filed a civil lawsuit against EDF with the objective of preventing further human rights violations against the Unión Hidalgo community. The lawsuit argues that EDF's Vigilance Plan fails to adequately identify—or take appropriate measures to mitigate—the serious risks of violation of the Indigenous communities' rights to consultation as well as their physical integrity as a result of the project.[16]

In February 2021, in light of the slow pace of the legal proceedings and the imminent risk of irreparable and serious human rights violations posed by the development of the Gunaa Sicarú project, the plaintiffs presented a request for interim measures to the French judge.[17] The urgent request stipulated that the development of the Gunaa Sicarú project should be suspended until EDF complies with its duty of vigilance, in order to prevent further serious human rights violations. This request was rejected by the civil court in November 2021, in a decision that found the communities' claim under Article 1 of the Loi de Vigilance inadmissible on procedural grounds.[18] An appeal against this decision is currently pending before the Paris Court of Appeal.

15 See Observatory for the Protection of Human Rights Defenders, a joint program of the World Organization Against Torture (OMCT) and FIDH, MEX 007/0619/ OBS 051, 18 June 2019 (https://www.omct.org/es/recursos/llamamientos-urgentes/amenazas-se%C3%B1alamientos-y-estigmatizaci%C3%B3n-en-contra-de-miembros-de-la-comunidad-ind%C3%ADgena-de-uni%C3%B3n-hidalgo-oaxaca), and United Nations, General Assembly *Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Mexico* UN Doc A/HRC/39/17/Add.2 (June 2018)
16 ECCHR, ProDESC and CCFD (2020).
17 This request for interim measure was presented before the juge de la mise en état. It is part of the pre-trial proceedings in France during which parties can, amongst other, exchange legal arguments, present motions for inadmissibility on procedural grounds, request evidence and conservatory measures (art. 789 of the French civil procedural code)
18 ProDESC (2021) Press release EDF in Mexico: Paris court misses opportunity to prevent human rights violations https://prodesc.org.mx/en/press-release-edf-in-mexico-paris-court-misses-opportunity-to-prevent-human-rights-violations/

TOTAL'S MEGA OIL PROJECTS IN TANZANIA AND UGANDA

TotalEnergies (Total) is the main operator of the Tilenga oil project, a major development on the shores of Lake Albert in Uganda. Partially situated in a protected natural park, the project comprises several oilfields and the construction of associated infrastructure including an oil refinery. The East African Crude Oil Pipeline (EACOP), also developed by a wholly-owned subsidiary of Total, is being constructed to transport the oil to the port of Tanga in Tanzania, where it will be exported to international markets.[19]

Field research undertaken in areas affected by Total's operations has documented numerous human rights violations and irreversible environmental damage linked to these two projects.[20] The lands of approximately 118,000 people have been affected, resulting in communities being totally or partially deprived of their lands and livelihoods. In return, residents have been forced to accept insufficient compensation, often under pressure and intimidation, and in violation of their right to land.

In June 2019, six French and Ugandan organisations[21] issued a formal notice to Total, informing it that these projects failed to comply with the company's legal obligations to prevent human rights and environmental harm.[22] After Total rejected these accusations, the organisations filed a case under the LdV, the first legal action of its kind. The case requests that the judge order Total to bring its Vigilance Plan into compliance with the law by including all of the risks of serious harm associated with the Tilenga and EACOP projects as well as the appropriate vigilance measures to be developed to prevent and mitigate these risks, and to suspend the projects until these measures have been effectively developed and implemented.

After a delay of three years of procedural challenges to determine the competence of the civil court to adjudicate cases brought under the LdV, arguments on the substance of the case against Total were finally heard in December 2022. In a decision of 28 February 2023, the Paris civil court issued a summary judgement dismissing the case, ruling that the complaint was inadmissible as the claims of the parties were substantially different to those included in the formal notice sent to Total in 2019.[23]

The claimant organisations contest the assertion that they have substantially modified their demands, stating that they submitted more than 200 documents in order to clarify their requests. The amount of evidence provided is proportionate to the basis of the claim and necessary to update their complaint in light of the procedural challenges initiated by Total in 2019.

19 Amis de la Terre and Survie, *Serious breaches of the Duty of Vigilance Law: The case of Total in Uganda* (June 2019)
20 Amis de la Terre and Survie, *A Nightmare Named Total* (December 2020)
21 Amis de la Terre, Survie, AFIEGO, CRED, NAPE/Friends of the Earth Uganda, NAVODA
22 Amis de la Terre and Survie (2020), Total Uganda, A first lawsuit under the duty of vigilance law : an update
23 Amis de la Terre, "Total's Tilenga and EACOP Projects: the Paris Civil Court dodges the issue" (23 February 2023) https://www.amisdelaterre.org/communique-presse/totals-tilenga-eacop-projects-paris-civil-court-dodges-issue/

Squaring the circle

Recognising the protection of Indigenous land rights under the "Duty of Vigilance" law

"HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS": DETERMINING THE SCOPE OF THE VIGILANCE OBLIGATION

Whereas Indigenous peoples are among the groups most vulnerable to business-related human rights abuse, the LdV is ambiguous as to whether the specific rights accorded to Indigenous peoples under international human rights law fall within the scope of the vigilance obligation. This has substantial and procedural implications for Indigenous communities that have been negatively affected by the activities of French corporations.

The scope of the vigilance obligation is broadly defined under the law, requiring that the vigilance plan must identify and prevent risks of severe violations of "human rights and fundamental freedoms, the health and safety of people and the environment."[24] The reference to "human rights and fundamental freedoms" is notably vague, creating considerable uncertainty on *which* human rights are covered. This issue was highlighted in preparatory works of the law:

> *It will be necessary to specify in this article the details of the rights and freedoms to be protected and the seriousness of the physical and environmental damage to be prevented. Moreover, a large number of human rights are exercised within the limits established by law and, since the infringements in question will most often take place in foreign state and legal systems, the degree of protection attached to them is likely to vary. The role of the judge will be to assess the circumstances to determine whether the company has properly fulfilled its duty of care.*[25]

The first point of reference to determine the scope of "human rights" is the definition of these terms as they exist in French law, as well as France's commitments under international and European human rights conventions.[26] However, it is also critical that the interpretation of the substance of these rights takes into account the purpose of the law: to regulate the extraterritorial activities of French corporations in order to prevent harm to people and planet. In other words, the human rights considered to be protected, and the risk of violations to be identified by corporations as part of their vigilance obligation, should be informed by international human rights law that applies irrespective of the jurisdiction in which the violation took place.

24 French Commercial Code Article L. 225-102-4-I
25 Report n° 2628 of the Commission des lois de l'Assemblée Nationale, p.66
26 Sherpa, *Vigilance Plan Reference Guidance* (2019) p. 37. See also Report No. 2628. p. 66"A formal definition is generally accepted according to which fundamental rights are proclaimed by texts of constitutional status (…) as well as by international and European conventions. They include both first generation rights and liberties (right to property, freedom of conscience, political rights, habeas corpus etc.), second-generation rights (right to work, access to health care, education, right to strike, etc.) and third-generation rights (environment, bioethics, etc.)."

This interpretation reflects the UNGPs, which state that *"in all contexts, business enterprises should comply with all applicable laws and respect internationally recognised human rights, wherever they operate"* and "*seek ways to honour the principles of internationally recognised human rights when faced with conflicting requirements.*"[27] The UNGPs were consistently referred to during the legislative process as the guiding philosophy of the duty of vigilance, and should therefore be seen as a crucial interpretative tool to address gaps and inconsistencies in the text.[28] These soft law standards emphasise that where there is a conflict of law between national legal frameworks and international human rights standards, the latter prevails: multinational corporations cannot rely on the absence of specific legal protections under the domestic law of where they operate to limit the scope of their human rights due diligence obligation. This reasoning would also apply in a scenario in which the domestic legal framework in the jurisdiction where a corporation is headquartered does not recognise certain international human rights standards—including where that country has adopted mandatory human rights due diligence legislation.

INDIGENOUS RIGHTS UNDER INTERNATIONAL HUMAN RIGHTS LAW

The collective rights of Indigenous peoples to lands, territories and resources are inextricably linked to the right of self-determination, recognised as a general principle of international human rights law and enshrined in multiple international treaties.[29] This includes the fundamental right to collective ownership and control over the lands, territories and resources that they have traditionally owned, occupied or otherwise used and acquired.[30] Convention No. 169 of the International Labour Organization enshrines the fundamental rights of Indigenous peoples under international law, in particular their land ownership rights,[31] and secures minimum standards regarding consultation and consent for any activity that may affect them[32]—including those related to the use of land.[33] In addition, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted in 2007, upholds Indigenous peoples' right to decide what happens on their land and states that any project affecting their lands, territories or resources should only take place with their free, prior and informed consent.[34]

These international human rights standards have been integrated into protections at regional level. For example, within the Inter-American human rights system Indigenous peoples' right to communal property over their lands and natural resources is recognised as a right in itself,

27 OHCHR, "Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework" (UNGPs), (2011), Principle 23
28 Report n° 3582 of the Commission des lois de l'Assemblée Nationale (March 2016), p. 11
29 Charter of the United Nations, Article 1(1); International Covenant on Civil and Political Rights, Article 1(1); International Covenant on Economic Social and Cultural Rights Article 1(1)
30 UN Declaration on the Rights of Indigenous Peoples (UNDRIP), UN Doc A/RES.61/295 (September 2007), Article 26
31 Indigenous and Tribal Peoples Convention, 1989 (No. 169), Article 14
32 Ibid Article 6
33 Ibid Article 16-17
34 UNDRIP Article 19: "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them"

as well as a guarantee of the effective enjoyment of other basic rights.[35] In its 2007 decision on Saramaka, the Inter-American Court of Human Rights ruled that the property rights of Indigenous and tribal peoples derive from custom and not from the state, and that they have the *"right to manage, distribute, and effectively control (their)…territory, in accordance with their customary laws and traditional collective land tenure system."* When proposing a concession in Indigenous territories, the State has a duty to consult with the members of the community in conformity with their traditions and customs.[36]

Domestic legal systems in several states with large Indigenous populations have also adopted constitutional or operational provisions introducing the right of Indigenous peoples to land and territories.[37] In Mexico, for example, the collective land ownership of *ejidos* and *comunidades agrarias* is recognised under Article 27 of the Constitution. The creation of these different forms of collective "agrarian" land ownership is rooted in historical and political legacies: the rights of *ejidos* were created by the state following the civil war, whereas *comunidades agrarias* (the majority of which are Indigenous communities) already had collectively-owned land before colonisation that was later titled and restituted to Indigenous communities by the state. In both *ejidos* and *comunidades agrarias* the governance of the collective land is established and approved by an assembly formed of *ejidatarios* or *comuneros* (ejidal and communal assembly) that makes decisions over the use and enjoyment of land, and whether to agree to the use of land by a third party.

THE PRINCIPLE OF FREE, PRIOR AND INFORMED CONSENT

A fundamental element of the protection of Indigenous peoples' collective land rights is the principle of free, prior and informed consent (FPIC). FPIC is a right explicitly recognised in the ILO Convention 169 on Indigenous and Tribal Peoples,[38] the Convention on Biological Diversity[39] and the UN Declaration on the Rights of Indigenous Peoples.[40] It constitutes three interrelated and cumulative rights of Indigenous peoples: the right to be consulted, the right to participate and the right to their lands, territories and resources.[41] FPIC does not therefore create new rights, but provides a contextualised elaboration of general human rights principles and rights as they relate to the specific historical, cultural and social circumstances of Indigenous peoples.[42] According to FPIC, States must consult with Indigenous peoples with the objective of securing their consent before adopting and implementing legislative or administrative measures that may affect them. The consultation process must be:

35 See: Organization of American States (2009) Indigenous and tribal peoples' rights over their ancestral land, Norms and Jurisprudence of the Inter-American Human Rights System, OEA/Ser.L/V/II. Doc. 56/09 30 December 2009
36 I/A Court H.R., Case of the Saramaka People v. Suriname, Judgment of November 28, 2007, Series C No. 172
37 FIAN International, *Collective Rights briefing note* (March 2018) p.10
38 Articles 6, 15, 16 and 35
39 Article 8(j)
40 Article 19, Article 32(2)
41 UN Human Rights Council, Study of the Expert Mechanisms on the Rights of Indigenous Peoples, "Free, prior and informed consent: a human rights-based approach", UN Doc A/HRC/39/62 (2018) para 14
42 Ibid, para 3

- Free: the consultation process should take place in a context free from intimidation, coercion or manipulation and harassment, in a spirit of trust and good faith between parties. Representative institutions should be freely chosen and should be able to control the process and logistics of the consultation.
- Prior: the consultation must take place before any decision is made on a proposed action, including the development and planning phase, before agreements are signed and exploration permits granted.
- Informed: the information provided during the consultation process must be sufficient in quantity and quality; objective, accurate and clear; and presented in a language understood by the communities in question. The information provided should cover the nature, scale, pace, reversibility and scope of the project.[43]

FPIC is both a process and an outcome. As a process it involves the exchange of information, consultation, deliberation and negotiation with the affected community before the implementation of activities. At the end of this process, the community may give consent, either with or without conditions, or refuse its consent.

THE CORPORATE RESPONSIBILITY TO RESPECT INDIGENOUS LAND RIGHTS

The State is the primary duty-bearer in upholding the collective land rights of Indigenous communities through the implementation of the FPIC process. However, this does not limit the responsibility of corporations to respect these rights when carrying out their activities. The UNGPs clearly state that the business responsibility to respect exists "independently of States" abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations."[44] When applied in an Indigenous rights context, the absence of protection of Indigenous land rights either in law or practice within the country in which a company operates does not absolve it of the obligation to respect these rights.

According to the UN Special Rapporteur on Human Rights Defenders: *"any company involved in a project or projects that might affect Indigenous communities should promote prior and meaningful consultations with them; refrain from taking actions that can affect these consultations, including actions that can contribute to the division of communities; and offer all the relevant information on the projects concerned to the affected people in an accessible and culturally appropriate way."*[45] Prior to undertaking a project, companies should carry out human rights due diligence to assess whether Indigenous peoples may be negatively affected, to what extent Indigenous peoples' rights are respected by the State and whether the authorities have effectively consulted and obtained the consent of local communities before issuing a license or concession.[46] Companies

43 Ibid para 20 – 23
44 UNGPs Principle 11
45 UN Human Rights Council, Report of the Special Rapporteur on the situation of human rights defenders on his mission to Mexico, UN Doc A/HRC/37/51/Add.2, (2018) 99
46 Danish Institute for Human Rights, *Respecting the Rights of Indigenous Peoples—a due diligence checklist for business* (June 2019), p 10

should also ensure that no actions that could interfere with the exercise of FPIC are taken by its business partners.[47]

In order to demonstrate respect for the right to FPIC, companies should be prepared to contribute in good faith to consultations led by governments—and where the government fails to meet its own obligations, engage with civil society stakeholders to ensure that consultation and FPIC processes are carried out.[48] In addition, if any gaps are identified in the host state's protection of FPIC prior to a company initiating activities (such as in the permitting or licensing process), the company should suspend their activities until they can ensure that FPIC has been properly secured according to international standards and consent properly obtained.[49] The OECD Guidelines on corporate due diligence make this point clear:

"Business operations may not be inherently risky, but circumstances (e.g. rule of law issues, lack of enforcement of standards, behaviour of business relationships) may result in risks of adverse impacts. Due diligence should help companies anticipate and prevent or mitigate these impacts. In some limited cases, due diligence may help them decide whether or not to go ahead with or discontinue operations or business relationships as a last resort, because the risk of an adverse impact is too high or because mitigation efforts have not been successful."[50]

In practice, the vast majority of extractive or infrastructure projects move forward without ensuring that Indigenous peoples' free, prior and informed consent has been secured. According to the Land Matrix, of the more than 250 large-scale land acquisitions in developing countries on which information on consultation is available, only 15% report that FPIC was given while almost 45% report no consultation whatsoever.[51] When adopted, FPIC formats often fail to provide communities with adequate information at the earliest stage possible, or fail to safeguard them from undue influence from corporations or government officials.[52]

The consultation of Indigenous communities regarding the development of wind power projects in Mexico has consistently fallen short. Of the 28 wind power projects operating in the Istmo region, consultation processes have either not taken place or have been deeply flawed, conducted after companies have been granted electricity generation licenses by the government and/or have signed usufruct and lease contracts giving them access to land. These failures have been noted by the UN Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, highlighting that *"the urgency of attracting investment, the inadequacy of safeguards and the lack of capacity to enforce existing legislation create an environment in which human rights can be violated with impunity."*[53]

47 UNGPs, Principle 13b
48 Accountability Framework, *Operational Guidance on Free, Prior and Informed Consent*, (June 2019), p.15
49 Ibid p.5
50 OECD, *Due Diligence Guidance for Responsible Business Conduct* (2018) p.16
51 Land Matrix, *Taking stock of the global land rush* (2021) p.12
52 ECCHR, ProDESC and CCFD (2020)
53 UN Human Rights Council, "Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on its mission to Mexico", UN Doc A/HRC/35/32/Add.2 (2017) para. 7.

In the Gunaa Sicarú project, a consultation process was only begun following legal action brought by members of the Unión Hidalgo community, three years after EDF entered into negotiations with individual landowners to gain access to land. The consultation was in clear violation of international standards on FPIC which resulted in a judge ordering its suspension and then its proper implementation.[54] Nevertheless, EDF continued to press forward with the development of the project despite clear indications of ongoing violations of FPIC: the failure of the Mexican state to conduct the consultation process in accordance with international standards; the decision of the amparo judge; and evidence of coercion and intimidation of community members linked to the activities of its local contractors as documented by civil society.

As will be explained in the next chapter of this report, the assessment of a company's respect of the vigilance obligation to "take all reasonable measures" to prevent serious violations of human rights should be interpreted *in concreto*, taking into account the specific context in which the corporation has sought to operate. Therefore, for companies seeking to develop projects in countries where violations of FPIC rights have been widely reported by human rights bodies, NGOs and media—such as in Mexico—the identification of this risk and the adoption of mitigation measures should be clearly defined within their vigilance plan.

USUFRUCT CONTRACTS AND LAND GRABBING: A SYSTEMIC CORPORATE PRACTICE IN THE EXTRACTIVES SECTOR

The conclusion of usufruct and lease contracts on land is a recurring practice in the development of extraction projects. When such contracts relate to land collectively held by Indigenous peoples, their negotiation and conclusion before the consent of the community has been sought represent a violation of free, prior and informed consent.

Acts of corporate land appropriation and subsequent private-contracting of collective and communal lands to wind power companies reflect a systematic corporate practice in the Istmo in Mexico,[55] often carried out in collusion with local government officials who stand to benefit from inward investment.[56] When such lands are also part of an ejido or comunidad agraria, Mexican law states that the Ejido or Communal Assembly must authorise such agreements. The existence of ejidos and comunidades agrarias is therefore seen as a major obstacle in securing land for development, given the need for collective negotiation and decision-making around the use of this property.

54 Judicial decisions regarding the writs of amparo No. 376/2018, 377/2018 and 554/2018 issued by the First District Federal Court in State of Oaxaca, Mexico (2018)
55 S Friede, *Enticed by the Wind: A case study in the social and historical context of wind energy development in Southern Mexico* (2016), Wilson Center (ed.)
56 P Matias "Para despojarlos de sus tierras, declaran muertos a más de mil comuneros… que están vivos", Proceso, 1 July 2021 https://www.proceso.com.mx/nacional/2021/7/1/para-despojarlos-de-sus-tierras-declaran-muertos-mas-de-mil-comuneros-que-estan-vivos-267037.html.

To circumvent these processes multinational corporations, acting through their local subsidiaries and with the involvement of local public officials to formalise the process, sign private lease or usufruct contracts with individual "landowners" that grant them access to the land prior to any adequate consultation with impacted community members.

When challenged on the legality of usufruct contracts, energy companies have argued that the land in question is private property. In doing so, they seek to benefit from gaps and inconsistencies on the legal status of land. For example, the absence of a functioning internal administrative body (comisariado) to make decisions on collective and communally held land has facilitated land grabbing and the signing of usufruct agreements. In contexts where pre-existing land conflicts are known to exist, effective human rights due diligence requires that prior to any development activities corporations take reasonable measures to identify the property status of the lands in question, and implement measures to prevent the infringement of property rights of affected community members. As highlighted by the French National Contact Point of the OECD in the complaint brought by Unión Hidalgo and ProDESC, the activities to establish the status of land need to go beyond judicial and administrative verifications and include consultation with local civil society stakeholders and experts aware of the specific social and cultural context around Indigenous land rights. Failure to establish the land status can have a "snowball effect", leading to violations of FPIC rights and also fuelling land-related conflicts and intra-community violence.

In the case of Unión Hidalgo, the land on which the Gunaa Sicarú project was intended to be developed is classified as agrarian property, and therefore subject to approval from the communal assembly, in addition to the consultation process required to obtain FPIC of the Indigenous community. Despite this, it appears from the documentation obtained from the claimant associations that EDF's subsidiary Eólica de Oaxaca concluded usufruct contracts with individual members of the community that described themselves as before any adequate consultation process had taken place. Through this process EDF was able to gain access to nearly 5,000 hectares of communal land.

In a recent development, usufruct contracts for the Piedra Larga wind farm (also in Unión Hidalgo) have been declared illegal on the basis that they concerned communal land. In two judgements from August and November 2022, the Federal Agrarian Tribunal in Tuxtepec, Oaxaca declared that 13 contracts between Demex (a subsidiary of Spanish energy company Renovalia Energy) and individuals for the installation of the wind farm contravened Agrarian law, since they improperly considered the land as private property.[57] This sets an important precedent against corporate land grabbing in other wind farms in the region and in Mexico.

57 ProDESC, "Legal victory for the members of the community of Unión Hidalgo: Precedent to defending land against wind farm abuses", 6 September 2022 available at https://media.business-humanrights.org/media/documents/Press_release_UHvsDemex.pdf

ADJUDICATING COLLECTIVE LAND RIGHTS UNDER THE "DUTY OF VIGILANCE" LAW

The ambiguity surrounding the scope of human rights protected under the LdV creates substantial uncertainty for rights that have been enshrined within international human rights treaties but not integrated into national legal frameworks. Many countries, especially in the Global North, do not recognise the collective rights of Indigenous peoples. For example, France has not ratified ILO Convention 169, the only legally binding international instrument that recognises the collective rights to land of Indigenous peoples and their right to self-determination. This is based on the interpretation of the constitutional principle of republicanism according to which there are no minority groups, which would prevent Indigenous rights from being protected under French law.[58]

Yet the absence of a right to collective property under French law should not prevent those affected by violations of the duty of vigilance to assert their rights under the LdV. When adjudicating on cases filed under the LdV, in their assessment of compliance with the vigilance obligation French judges should therefore take into account how the activities of corporations may result in severe violations of collective land rights. This requires an understanding of how these rights are protected under international human rights law, as well as within the domestic legal systems of the countries in which corporations operate.

> The need for a teleological interpretation of human rights due diligence is clearly identified within the UNGPs

The need for a teleological interpretation of the content of the business responsibility to respect human rights is clearly identified within the UNGPs:

"*Because business enterprises can have an impact on virtually the entire spectrum of internationally recognised human rights, their responsibility to respect applies to all such rights. In practice, some human rights may be at greater risk than others in particular industries or contexts, and therefore will be the focus of heightened attention…Depending on circumstances, business enterprises may need to consider additional standards. For instance, enterprises should respect the human rights of individuals belonging to specific groups or populations that request particular attention, where they may have adverse human rights impacts on them. In this connection, United Nations instruments have elaborated further on the rights of Indigenous peoples…*"[59]

This means that the rights violations that corporations are expected to identify, mitigate and remedy as part of their vigilance obligation should take into account the context in which the business—or its subsidiaries, suppliers and subcontractors—operates, and the actual and potential impacts that these operations may have on individuals and groups.

58 See Jeremie Gilbert and David Keane. "Equality versus fraternity? Rethinking France and its minorities." *International Journal of Constitutional Law* 14.4 (2016): 883-905.

59 UNGPs, Principle 12

Adopting a broad interpretation of the vigilance obligation is essential to effectively prevent business-related human rights harms: a narrow legal approach would neglect the objective of the law.[60]

Conflicts over access to and status of land—and the associated violence that this can create—are precisely the risks that businesses should take into account when developing their projects and adopt reasonable measures to mitigate. In practice, this means not proceeding with activities where these may cause, contribute or be directly linked to serious violations of the Indigenous right to land and subsequent risks for the safety of human rights and land defenders. In these contexts, it is essential that companies identify their responsibility: to respect domestic law with regard to land tenure, to refrain from taking actions that take advantage of loopholes in the administration of collective land and/or fuel land conflicts, and to actively seek to clarify the status of the land needed for the development of their projects by consulting the appropriate stakeholders. As with the obligation to respect FPIC, this duty operates independently from that of the state to protect international human rights.

Adopting a broad interpretation of thevigilance obligation is essential toeffectively prevent business-related human rights harms

A teleological approach should also be adopted in the assessment of tort claims for compensation of damages under Article 2 of the LdV. French tort law requires the proof of an individual damage, whereas Indigenous communities' property rights are of a collective nature. The violation of a collective right to land through corporate land grabbing can lead to individual material damages, such as the loss of economic subsistence or restricted access to water, and moral damages resulting from the impairment of the right to use for cultural and spiritual purposes. An overly restrictive interpretation of the LdV's mechanism for compensation of damages would substantially impair the ability of Indigenous communities to claim individual damages for the non-respect of their property rights.

60 C Dubost and D Potier, "Rapport d'information sur l'evaluation de la loi du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre", N° 5124 (February 2022) p.37

Risks and rights-holders

Adopting a contextual interpretation of the vigilance obligation

As an *obligation de moyens,* the duty of vigilance requires companies to take all reasonable measures to identify and prevent serious human rights and environmental violations resulting from their activities or those of their subsidiaries, suppliers or subcontractors. It does not impose an *obligation de résultats*—in other words a guarantee of the non-violation of human rights or the active realisation thereof. The determination of what constitutes "reasonable measures" to identify and prevent human rights and environmental impacts is fundamental to the effective implementation of the vigilance obligation—yet the law is silent on the scope and methodology of this critical question.

The concept of human rights due diligence introduced in the UNGPs can be used to fill these interpretative gaps. It is clear from the preparatory works of the LdV that the UNGPs served as the inspiration for the vigilance obligation, seen alongside the OECD Guidelines as the "ideal and internationally recognised foundation for the construction of a vigilance plan".[61] The emphasis in the UNGPs—as well as in the OECD Due Diligence Guidance for Responsible Business Conduct—is on the *in concreto* nature of the business obligation to respect human rights, as an ongoing process[62] to be carried out in consideration of the cultural, economic, sectorial and political context of a company´s activity.[63] The implementation of the vigilance obligation therefore necessitates an active awareness and understanding by the company of how their activities—and those of the actors within their global value chain—may cause negative effects in the specific contexts in which they operate. This should directly inform the "reasonable measures" that the company takes to mitigate and prevent these negative effects. This interpretative approach is essential in contexts where corporate activities have been linked to threats and violence against human rights defenders.

VIOLENCE AGAINST HUMAN RIGHTS DEFENDERS: "COMMUNITY CAPTURE" IN THE EXTRACTIVE INDUSTRY

Human rights defenders play a crucial role in addressing and preventing corporate human rights violations, as advocates and watchdogs of business activities. However, they are also regularly subjected to attacks and reprisals as a result of this work, notably in the context of large development projects that affect access to land and the

61 Report n° 3582 of the Commission des lois de l'Assemblée Nationale (March 2016), p. 11

62 OECD (2018) p 17-18

63 UNGPs, Principle 17 (c) "human rights due diligence… should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve". See also OHCHR, "The corporate responsibility to respect human rights: An interpretative guide" (2012), p.20

rights of Indigenous peoples and local communities.[64] According to Global Witness, 200 land and environmental defenders were killed in 2021.[65] Indigenous human rights defenders are disproportionately affected, comprising over 40% of all fatal attacks in 2021 despite Indigenous peoples representing only 5% of the world's population.[66]

Violence against human rights defenders is often linked to, and exacerbated by, business activities. Whereas it is uncommon for multinational corporations to be directly involved in committing violence and attacks, the tactics used by the business or their local subsidiaries to gain access to land can ntra-communal violence. Groups and individuals that stand to financially benefit from extractive projects, such as landowners that have allegedly signed usufruct or lease contracts as well as local suppliers and subcontractors, may resort to using threats and violence against members of the community that oppose these developments or insist on the respect of the FPIC process, in order to ensure that the project goes ahead. The systematic violation of FPIC rights regularly leads to stigmatisation, criminalisation and violence against the intended beneficiaries of these protections, in particular human and environmental land rights defenders.

The systemic nature of these practices in the extractive industry underlines the importance of their identification as a risk to mitigate and prevent as part of the duty of vigilance. As illustrated in the numerous testimonies in the EDF case,[67] extractive companies are known to use public relations and information campaigns prior to and during FPIC consultation processes that present a positive image of the benefits associated with a project but provide limited information on the anticipated negative impacts.[68] Whereas these actions may not appear prima facie to be harmful, when assessed within the political, legal and cultural context of Indigenous communities that may have limited access to information, they can severely impair the exercise of FPIC. In addition, companies may promise development benefits as a way to induce community acceptance of projects, such as jobs and investment in local infrastructure that take advantage of the socio-economic vulnerability of Indigenous communities. In practice, these are often false promises that fail to deliver. For example, local communities do not receive any of the electricity generated on wind farms constructed on their land, which is sold directly on international markets, leaving the community doubly disadvantaged.[69] Corporate philanthropic initiatives such as providing donations to local charitable institutions are also deployed to generate support from within the community, which in some cases may amount to bribery.[70] In reality, these tactics represent a form of "community

64 UN Human Rights Council, "The Guiding Principles on Business and Human Rights: guidance on ensuring respect for human rights defenders", UN Doc A/HRC/47/39/Add.2 (June 2021) p.3
65 Global Witness, *Decade of Defiance*, (September 2022), p.9
66 Business and Human Rights Resource Centre, *In the Line of Fire* (March 2021), p.2
67 For more detail on the Unión Hidalgo case see ECCHR, *Civil society space in renewable energy projects: A case study of the Unión Hidalgo community in Mexico* (2019) available at : https://www.ecchr.eu/publikation/civil-society-space-in-renewable-energy-projects-a-case-study-of-the-union-hidalgo-community-in-mexico
68 T Mebratu-Tsegaye, *Free, prior and informed consent: addressing political realities to improve impact*, (October 2020), Columbia Center for Sustainable Investment (eds.)
69 See "La danse de la mort d'EDF dans le sud-est du Mexique", Lundimatin (30 March 2020) available at https://lundi.am/La-danse-de-la-mort-d-EDF-dans-le-sud-est-du-Mexique
70 See OECD, *Frequently Asked Questions: How to address bribery and corruption risks in mineral supply chains* (2021), p.22

manipulation" (one of the most common manifestations of corporate capture), undermining the ability of communities to freely give or withhold their consent.[71]

The use of "divide and rule" practices can also undermine social cohesion within communities, pitting the supporters of development projects against human rights defenders seeking to protect Indigenous lands, traditional modes of agriculture and economic subsistence. They can have profound and negative effects on collective solidarity in affected communities, causing the breaking of social fabric, violations of FPIC, and the escalation of violence against human rights defenders.[72]

> „Divide and rule" practices can undermine social cohesion within communities

Consequently, taking steps to mitigate and prevent the risk that these rights violations may occur is an integral part of the duty of vigilance of corporations operating in the extractive sector. The obligation to ensure that "their activities, actions and omissions do not lead to retaliation, violence, death, legal harassment or any other form of silencing or stigmatisation of human rights defenders" is a clearly recognised aspect of the business responsibility to respect human rights.[73] This obligation entails, as part of human rights due diligence, that companies identify actual or potential adverse impacts on human rights defenders linked to their projects, either through their own activities or as a result of their business relationships. Given the severity of the risks of attacks against human rights defenders—which can include killings, kidnapping and violent attacks—these are often one of the most salient considerations for corporations to consider, especially when operating in countries and contexts where reprisals against human rights defenders are known to take place.

Prior to developing or implementing a project a business has a responsibility to consider, in advance, the likelihood that, in the context as a whole its engagement may give rise to social unrest or conflict, and to take steps to prevent or mitigate these impacts throughout the project lifecycle.[74] Where there is evidence that human rights defenders have been negatively impacted as a result of company activities—either directly or through their supply chain—companies should use their leverage with host governments to undertake protective measures or investigate allegations, support independent investigations and provide for remedy.[75] According to the OECD Guidelines, where attempts to mitigate harm have failed and the human rights impacts are severe, companies should consider temporarily suspending their activities

71 See information from ESCR-Net available at https://www.escr-net.org/fr/nouvelles/2019/deballer-capture-dentreprise-manipulation-communautes
72 UN Human Rights Council (2018) para. 47..
73 UN Human Rights Council (2021) para 54
74 Forest Peoples Programme Stepping up: Protecting collective land rights through corporate due diligence (2021)
75 For further details on HRDD related to human rights defenders, see Global Witness, *Responsible Sourcing: the business case for protecting land and environmental defenders and indigenous communities' rights to land and resources* (April 2020)

while pursuing ongoing mitigation efforts, or as a last resort disengage entirely.[76] Although there is no clear definition of severe human rights impacts, the scale and scope and the irremediable nature of the impact should be taken into account.[77] Repeated attacks and violence against human rights defenders linked to extractive projects could be considered to meet this threshold, requiring that a company ends its business relationships that may contribute or be directly linked to this harm.

Companies are also expected to actively engage with and consult stakeholders that may be impacted by their activities, as part of their human rights due diligence. In the context of extractive projects on Indigenous lands, land and human rights defenders would be among those that should be clearly identified and consulted by corporations prior to and during project development. This requirement is reflected in the LdV, which provides that the vigilance plan is to be drawn up in association with the company's stakeholders.[78] The general engagement of stakeholders in the establishment of the Plan should happen at all stages and on a continuous basis.[79] Although stakeholders are not defined under the law, in the context of the vigilance obligation this would include individuals and groups whose rights and obligations are affected, directly or indirectly by the company's failure to perform its duty of vigilance.

It is therefore essential that French Courts, who carry the important task of shaping the content of the vigilance obligation, do so with the constant awareness of the extraterritorial nature of the LdV. This necessitates an in-depth analysis that goes beyond verifying the existence of a vigilance plan, to "verify the content and quality of the vigilance plan if it is contested"[80] that takes into account the context in which the alleged rights violations have taken place. In practice this would mean obtaining, according to the rules of procedure, accurate information on the cultural, legal, political and social context of corporate operations and their supply chains, as well as on the specific vulnerabilities of rights-holders affected by these activities. One example would be to seek the input of amicus curiae to provide this specific expertise. on the reality of the risks in this context and the effectiveness of the preventive measures proposed by the company.

ATTACKS AGAINST HUMAN RIGHTS DEFENDERS IN UNIÓN HIDALGO

Mexico is one of the most dangerous countries for human rights defenders, recording the highest number of killings globally in 2021.81 Violence, criminalisation and attacks on opposition voices challenging megaprojects on Indigenous lands and territories has been repeatedly recognised by UN bodies and international NGOs.[82] The state of Oaxaca in Mexico has seen one of the highest number of attacks, particularly within Juchitán where violence has been explicitly linked to the construction of wind power projects.[83]

76 OECD, *OECD Guidelines for Multinational Enterprises* (2011), II C.22
77 UNGPs, Principle 19
78 French Commercial Code, Art. L. 225-102-4 I para 4, resulting from Law No 2017-399 of March 27,2017 on the Duty of Vigilance
79 Sherpa (2019) p.44
80 Proposition de loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre N°2578 (11 February 2015) p.12
81 Global Witness (2022) p10
82 UN General Assembly, *Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Mexico* (2018), para. 41.
83 Centro Mexicano de Derecho Ambiental, *Report on the situation of human rights defenders* (2019) p. 11.

In Unión Hidalgo, threats and attacks against land and human rights defenders related to the Gunaa Sicarú project began to escalate after flawed Indigenous consultation meetings began in April 2018. A social media and radio campaign stigmatised defenders as "enemies of development" and "anti-wind-energy activists", publicising their personal information and inciting community members to take action to eliminate opposition to the project. Direct threats against the physical integrity of these project critics and their families followed For example an outspoken defender was harmed in an allegedly intentional car accident and a member of the Resistance Committee suffered an attempted abduction.[84] The severity of the attacks has gained international attention, and resulted in an urgent appeal from the World Organisation Against Torture and the International Federation for Human Rights in June 2019.[85] Attacks have continued in recent years. In February 2022, Edgar Martin Regalado, a member of the Collective for the Defence of Human Rights and Communal Property of Unión Hidalgo, was the victim of an armed attack launched from a car as he was returning home from participating in a press conference discussing the legal actions against EDF.[86]

These attacks can be linked to the interventions of EDF's subsidiary Eólica de Oaxaca within Unión Hidalgo. The company entered into discussions with selected individuals in the community to gain rights to the land as early as 2015, offering privileged spaces for information and negotiation about the proposed project and promising that the wind farm would bring job opportunities and investment to the local area. This process led to the emergence of self-described "landholders committees" as important supporters of the project, motivated by economic benefits they would gain from the indemnities provided under the usufruct contracts. Once the consultation process began, these supporters escalated their activities to coercion, manipulation of votes, intimidation and violence against human rights defenders in the community.

THREATS AND ARRESTS CONNECTED TO THE TILENGA AND EACOP PROJECTS

In Uganda and Tanzania, human rights and environmental activists mobilising against the Tilenga and EACOP oil projects have been subjected to threats, harassment and acts of intimidation including arrests.[87] The NGOs involved in the lawsuit against Total report that it has led to an increase in attacks against civil society groups working in the region. The Ugandan organisations involved in the case have been prevented by the police and government from carrying out their work, including visiting affected communities trying to exercise their rights. Two community representatives that travelled to France to testify in the case were subjected to intense pressure and intimidation before and after their trip. In April 2020, four United Nations Special Rapporteurs sent a letter to Total, the French government and the Ugandan

84 ECCHR (2019) p 3
85 FIDH, "Mexico : Ataques a miembros de la comunidad indigena de Union Hidalgo (Oaxaca) por megaproyectos eolicos" (18 June 2019) available at www.fidh.org/es/temas/defensores-de-derechos-humanos/mexico-ataques-contra-miembros-de-la-comunidad-indigena-de-union
86 ProDESC, "Urgent Appeal: Defenders of Land, Territory and Human Rights of Unión Hidalgo, Oaxaca, at risk" (15 February 2022) available at https://prodesc.org.mx/en/urgent-appeal-defenders-of-land-territory-and-human-rights-of-union-hidalgo-oaxaca-at-risk/
87 Amis de la Terre, *A nightmare named Total* p.22

government expressing their concern that this harassment and use of scare tactics may violate the freedom of opinion and expression of other individuals impacted by the oil project.[88]

Although Total has offered to work on establishing alert mechanisms to protect local human rights defenders, this commitment has not been followed in practice. According to FIDH, on-the-ground company liaison officers are prone to making antagonistic remarks about defenders, whom they often describe as liars or "speculators" seeking financial gain through compensation mechanisms.[89]

THE RESPONSIBILITY OF THE STATE

The responsibility of the French state in the activities of EDF operates at two levels. Firstly, the extraterritorial violations of international human rights law documented in Unión Hidalgo (and in other instances) are connected to the activities of a private actor operating under French jurisdiction and control. Secondly, the French state has an obligation to address these violations in its role as investor and shareholder of EDF.[90]

The French State holds 83.6% of EDF's capital, with a shareholder commitment of around 21 billion euros. This represents 40% of the portfolio of the APE (Agence des Participation de L'Etat), the public agency that manages the government's public shareholding strategy as a "shareholder entity".

According to Principle 4 of the UNGPs, "states should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence."

As highlighted in the commentary to Principle 4 of the UNGPs, "where states own or control business enterprises, they have the greatest means within their powers to ensure that relevant policies, legislation and regulations regarding respect for human rights are implemented."[91] Therefore, through its shareholder control over EDF, the State has a distinct and complementary responsibility to ensure that the company exercises its vigilance obligation.

88 OHCHR, Communication on information received concerning acts of harassment and intimidation against two Ugandan individuals, UN Doc OTH 18/2020 (April 2020) https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=25135
89 FIDH, *New Oil, Same Business? At a crossroads to avert catastrophe in Uganda* (September 2020)
90 See CCFD, ECCHR, ProDESC, *Vigilance Switched Off* (June 2021)
91 OHCHR (2012) p.22

EXPANDING THE VIGILANCE PERIMETER: THE ROLE OF "BUSINESS RELATIONSHIPS" IN CORPORATE HUMAN RIGHTS VIOLATIONS

Despite the clear linkages between corporate tactics and attacks against human rights defenders as described earlier in this report, the narrow framework adopted under the LdV risks excluding the prevention of these harms from the scope of the vigilance obligation. According to L.225-102-4-1 of the French Commercial Code, the ambit rationae personae of the vigilance obligation—the "vigilance perimeter"—encompasses the "*operations of the company and of the companies it controls within the meaning of Article L.233.16, II, as well as from the operations of the subcontractors or suppliers with whom it maintains an established commercial relationship, when such operations derive from this relationship.*"

Limiting the application of the vigilance obligation to subsidiaries, suppliers and subcontractors represents a significant narrowing of human rights due diligence as established under the UNGPs, which applies to any impacts that a company causes, contributes or is directly linked to in its supply chain and business relationships. Principle 13 (b) states that:

the responsibility to respect human rights requires that business enterprises: (…) seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.

According to the Commentary to the UNGPs "*business relationships*" are to be understood in the broadest of senses, namely "*relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its "business operations, products or services.*"[92]

Moreover, the creation of an additional threshold of "established commercial relationship" as the criteria used to determine whether suppliers and subcontractors fall within the scope of the vigilance obligation raises a number of questions, both in terms of the uncertainty of its definition and its application in the context of transnational business operations. The preparatory works of the LdV refer to the jurisprudence regarding this notion under article L. 442-6-5, I of the Commercial Code, defining it as "a partnership which each party can reasonably expect to continue in the future".[93] However, this case law was developed in the context of protecting subcontractors and suppliers from the sudden termination of commercial partnerships—a wholly different scenario from that considered in the LdV which seeks to protect individuals and the environment.[94] Furthermore, the emphasis on the existence of a commercial relationship seemingly excludes non-commercial partnerships outside of a classic "upstream" supply chain relationship. Although the LdV was introduced in response to the Rana Plaza disaster, this type of supply chain relationship is not the only basis on which a multinational may be connected to human rights violations and

92 OHCHR (2012) p.45 "the activities that convert input into output by adding value. It includes entities with which (the company) has a direct or indirect business relationship and which either (a) supply products or services that contribute to the enterprise's own products or services or (b) receive products or services from the enterprise"
93 Report n° 2628 of the Commission des lois de l'Assemblée Nationale p.36 and p.71
94 C. Hannoun, Le devoir de vigilance des sociétés mères et entreprises donneuses d'ordre après la loi du 27 mars 2017: Dalloz soc. 2017, p. 806, spec. p. 810

environmental damage through its activities—for example, through investments or downstream activities.[95] Introducing this element imposes an arbitrary restriction on the concept of human rights due diligence, that does not reflect the reality of business-related human rights and environmental harms that regularly occur outside of the traditional supplier-buyer relationship.

A broad interpretation of the vigilance perimeter is particularly important when assessing the measures taken by companies to identify, address and mitigate risks to human rights defenders. As highlighted in the previous section, the perpetrators of violence against human rights defenders are most likely to be community members advancing their own personal interests. They may not be acting in the name, or on behalf of, a company but their actions are often linked to company activities that incentivise this behaviour. Whereas this could be considered within the definition of "direct linkage" under the UNGPs, on a strict interpretation of the LdV the absence of a "commercial relationship" between the corporation and the individuals carrying out the attacks would mean that these activities would fall outside of the vigilance obligation.

For example, it was the "landowners committees" that appear to have been main perpetrators of violence, intimidation and coercion of human rights defenders in Unión Hidalgo, motivated by the financial benefits secured through the usufruct contracts. The relationship between EDF and these "landowners" was noted in public materials on the project that referred to them as "commercial partners".[96] However, as defined under French law, this does not clearly fit within the parameters of an "established commercial relationship". It therefore becomes challenging to argue that EDF or its subsidiaries have an obligation to identify and mitigate the risk of attacks against human rights defenders by the landowners' activities—despite clear and compelling evidence demonstrating that the actions taken by the landowners took place within a context of close convergence with EDF's subsidiaries.

In order to align with the UNGPs, the interpretation of the vigilance perimeter should take into account the context in which French companies operate extraterritorially and how they conduct their activities. In certain sectors such as the extractives industry, this is likely to involve relationships with businesses and individuals that go beyond the provision of goods and services. For the extractive industry in particular, the importance of gaining access to land to conduct operations means that the consideration of landowners within the value chain is essential. Restricting the scope of application to purely commercial supply chain relationships could have significant consequences on the ability of the law to achieve its objective of preventing human rights violations and providing access to justice to those negatively impacted by company activities.

95 According to the OECD Guidelines, human rights due diligence covers all types of business relationships: suppliers, franchisees, licensees, joint ventures, investors, clients, contractors, customers, consultants, financial, legal and other advisors, and any other non-State or State entities linked to its business operations, products or services (OECD 2018, p.10)

96 A similar relationship was described in the context of EDF's Bluemex Power wind project see "EDF Renewables Mexico Announces Commercial Operation of Bluemex Power 1 Solar Project (3 July 2019) available at https://www.edf-re.com/fr/press-release/edf-renewables-mexico-announces-commercial-operation-of-bluemex-power-1-solar-project/

Procedural barriers to justice

Challenges in securing (interim) relief from corporate harm

The LdV is ground-breaking in that it is the first legislation to provide individuals and communities affected by extraterritorial business activities with a legal mechanism to access justice. When a company fails to respect its vigilance obligation, any party with standing can formally notify the company to comply—and if it fails to do so, the parties can request that the competent judge issue an injunction ordering the company to comply with the obligation to establish, implement and publish its vigilance plan.[97] Moreover, the law introduces civil liability when the activities of the company and entities within the vigilance perimeter cause damages that the execution of the vigilance obligation could have prevented.[98]

CIVIL LIABILITY AND THE BURDEN OF PROOF

Despite this promise, groups seeking to use the judicial mechanisms under the LdV have faced numerous obstacles in accessing justice. The notion of "equality before the law" is a fundamental element of the French legal system as well as international human rights law. Yet the inequality of arms between individuals and communities predominantly based in the Global South, against powerful corporate defendants in LdV cases suggests that this is far from the reality. Corporations have vast financial resources at their disposal and access to specialized legal teams that place them at a significant advantage compared to the groups and individuals submitting cases under the LdV. This power imbalance is reinforced by the fact that the burden of proof, in line with conventional civil remedies, is on the claimants to demonstrate a violation of the vigilance obligation. Therefore affected persons, often represented by pro-bono lawyers or NGOs, are faced with the challenging task of illustrating how a vigilance plan fails to comply with the law or is inadequately implemented, and then proving how this caused their own individual damage.[99] Much of this information is withheld by the companies themselves or covered by commercial or tax secret. The failure of the LdV to reverse the burden of proof by putting the onus on the company to demonstrate that it has taken all reasonable measures to avoid causing harm has been seen as a missed opportunity. These high evidentiary barriers are likely to disincentivise groups to use the legal mechanism under the LdV, and when cases are filed make them more costly and drawn-out. And while no legal action under the LdV has yet been through the merits stage on a compensation claim under the LdV, the effective access to remedy for claimants under the LdV remains an area of great concern amongst civil society and individuals or groups affected by corporate harm.

97 French Commercial Code, Art. L. 225-102-4 II, resulting from Law No 2017-399 of March 27,2017 on the Duty of Vigilance

98 French Commercial Code, Art. L Article L.225-102-5

99 European Union Agency for Fundamental Rights, *Business and Human Rights—Access to Remedy* (2020), p.6

INTERIM RELIEF AND THE PREVENTATIVE OBJECTIVE OF THE "DUTY OF VIGILANCE" LAW

Similar procedural hurdles have been encountered by groups seeking injunctive relief when challenging a company's failure to comply with the vigilance obligation. Given the objective of the LdV to prevent the risk of serious human rights and environmental violations, the possibility of recourse to conservatory measures is crucial, particularly in contexts where rights violations are ongoing or imminent. As has been highlighted previously in this report, flawed consultation processes of Indigenous peoples during the development of energy and extractive projects on Indigenous lands not only represents a violation of the right to free, prior and informed consent, but is linked to violence against human rights defenders. The procedural mechanism of conservatory measures is a way to avoid further harm, enabling parties to request that a competent judge order the suspension of a project until the case has been investigated and a decision on the merits issued.

In practice, this process has been beset with challenges. In the Unión Hidalgo case, community members issued a request for protective measures to the pre-trial judge in February 2021, shortly after filing their case against EDF. The request demanded that the Gunaa Sicarú project be suspended until a decision on the merits was taken, in light of the increasingly urgent situation on the ground, and the risk that the resumption of the Indigenous consultation would further violate the rights and physical safety of human rights defenders. This request was denied by the pre-trial proceedings judge on the basis that the legal claim filed by Unión Hidalgo and co. requesting EDF to modify its Vigilance Plan (the "injunction claim") was not valid on the basis that EDF had published a new Plan which needed to be the subject of a new formal notice.[100] The judge considered that the request for conservatory measures was linked to the injunction claim, and therefore, without even considering the merits of the latter, rejected both claims on procedural grounds. The community filed an appeal in December 2021—which was then appealed by EDF who claimed that the parties had no right to appeal such a decision. In March 2023 a decision from the Court of Appeal held that the appeal was admissible, finally providing the opportunity for an assessment on the merits of the claimants' request for EDF's plan to be modified as well as the demand for interim measures.

This series of procedural challenges and appeals has meant that over two years since the lawsuit was first filed, there has been no decision on the merits. During this time, community members have continued to face threats and violence as a result of their opposition to the wind farm. The refusal of the Court to consider the request for conservatory measures independently from all legal challenges pending on the main claims brought by Unión Hidalgo is a major obstacle to securing interim relief. Conservatory measures are designed to prevent future violations and maintain a legal or factual situation: judges should be able to rule on conservatory measure requests independently from other pending challenges on a given lawsuit.

100 Claim made on the basis of Article L.225-102-4 of the French Commercial Code to order EDF to publish a new due diligence plan.

The current interpretation and adjudication of requests for interim remedy limits the ability of communities and individuals to seek interim relief, undermines the preventive objective of the LdV and risks putting justice out of reach. Furthermore, the ability of corporations to use procedural challenges that lengthen the proceedings clearly demonstrates the imbalance of power between the parties in LdV cases—companies can use their immense financial resources to file new appeals and identify legal loopholes through which to evade responsibility. In the meantime, community members—and human rights defenders in particular—face the risk of ongoing rights violations while waiting for the French legal system to deliver justice.

THE SUMMARY JUDGEMENT PROCEDURE UNDER THE "DUTY OF VIGILANCE" LAW: A RECENT JUDGEMENT IN THE TOTAL CASE

The case against Total in relation to the Tilenga and EACOP projects was filed before the interim relief judge (juge des référés) with the objective of obtaining a swift decision in light of the urgency of preventing human rights violations and environmental harm. The complaint filed by the NGOs requested that the judge order Total to adopt the necessary vigilance measures to identify and prevent harm caused by these specific projects, or suspend the projects until these measures have been taken. The ability to use the summary judgement procedure to request urgent measures is provided for within the text of the LdV itself.[101] This provision reflects the central objective of the law, to prevent human rights and environmental violations before they occur. However, in a decision of the 28 February, the interim relief judge ruled that the claims in this case exceeded its competence, as the assessment of the content of the adequacy of Total's Vigilance Plan could only be carried out by a trial judge (juge du fond).[102] The decision states that the interim relief judge can only issue an injunction under the LdV in three situations: where a company has not published a vigilance plan; where the lack of substance of the plan renders it non-existent; or in a situation of "manifest unlawfulness". The decision refers to the lack of precision on the standard of reasonable vigilance within the LdV as one of the reasons why the interim relief judge does not have the competence to assess the claims against Total, which require an in-depth assessment on the merits.

The judge considered that additional evidence provided by the NGOs documenting developments in the situation between the formal notice in 2019 and the hearing—delayed by three years because of procedural challenges by Total—meant that the claims were "substantially different" and therefore inadmissible as a new formal notice had not been issued to Total. This interpretation would mean that impacted communities would not be able to modify their requests during the judicial process, despite information about the risk of imminent rights violations clearly being a central factor for consideration when seeking an injunction. This decision therefore appears to introduce further procedural hurdles to the implementation of the LdV, limiting the ability of affected groups to secure interim relief using the summary proceedings process to prevent further violations of their human rights.

101 French Commercial Code Article L.225-102-4 II
102 Amis de la Terre, "Total's Tilenga and EACOP Projects: the Paris Civil Court dodges the issue" (23 February 2023) https://www.amisdelaterre.org/communique-presse/totals-tilenga-eacop-projects-paris-civil-court-dodges-issue/

New horizons, new opportunities

Adopting a rights-holder-centred vigilance obligation at EU level

The LdV demonstrates that it is legally possible to regulate corporate behaviour in order to prevent corporate human rights and environmental violations. As the first law of its kind, it is an important source of inspiration for legislators in other countries seeking to introduce mandatory human rights due diligence.

> There is a significant risk that these laws will result in a tick-the-box exercise for corporations

However, the issues highlighted in this report challenge the assumption that mandatory human rights and environmental due diligence legislation, such as the LdV, will necessarily translate into substantive improvements for the individuals and communities negatively impacted by corporate conduct.. According to legal scholar Ingrid Landau, there is a significant risk that these laws will result in a tick-the-box exercise for corporations where they formally comply with their due diligence obligations, but do not have to substantially change their business practices to respect human rights or environmental standards.[103] An assessment of the human rights and environmental due diligence laws that exist or are under consideration highlights "inconsistencies, ambiguities, exemptions and other weaknesses that prevent them from adequately responding to the often-overlapping human rights and environmental abuses that are plaguing rights-holders and ecosystems worldwide."[104] Analysis carried out on vigilance plans by civil society since the law was introduced indicates that the majority remain vague in terms of risk identification and mitigation, tending to refer to generic risks and reiterating existing policies and processes rather than responding to specific issues associated with the companies' activities.[105] As has been seen in the case of Unión Hidalgo v EDF, these inconsistencies can significantly limit the effectiveness of mandatory human rights due diligence laws in achieving their objectives of preventing corporate human rights abuses.

103 I Landau, "Human Rights Due Diligence and the Risk of Cosmetic Compliance", (2019), *Melbourne Journal of International Law* 222
104 D R. Boyd and S Keene, *Essential elements of effective and equitable human rights and environmental due diligence legislation*, (June 2022), p.5
105 See for example CCFD, Sherpa, *The law on Duty of Vigilance of parent and outsourcing companies Year 1: Companies must do better,* (February 2019)

The EU Commission proposal for a Corporate Sustainability Due Diligence Directive (CSDDD) has the potential to create a significant positive impact by driving forward human rights due diligence within Europe. In particular, the Directive provides an opportunity to address and correct the ambiguities in the French law that have been highlighted in this report. Once adopted, the Directive will have to be transposed into French law, opening the door to the possibility that the LdV will need to be amended in the future to align with (stronger) European standards.

Yet, based on the draft directive published by the Commission in 2022, there is a risk that this opportunity has been missed, especially when considering the specific risks and vulnerabilities of Indigenous groups impacted by corporate behaviour such as Unión Hidalgo.

- The proposal defines a list of human rights to be covered under the due diligence obligation, which includes the right of Indigenous peoples to land, territories and resources. However, other critical rights of Indigenous peoples such as the right to self-determination and the right to FPIC are not explicitly included in this list. Even though these rights violations would be covered within a "catch-all clause" that lists international human rights agreements including UNDRIP, the threshold is higher as these human rights would only be within the material scope of the due diligence obligation if the company should have reasonably established the risk that they would occur.[106]
- Companies are required to only consult with stakeholders as part of the due diligence process "where relevant". This reflects the similar standard under the French law which states that the vigilance plan "is meant to be drawn up in conjunction with the stakeholders of the company" but does not make it mandatory. The usage of the term "stakeholders" would likely include Indigenous peoples, but could benefit from additional clarity and precision.
- Although the proposal introduces civil liability, it does not mention the possibility of interim relief where human rights violations are ongoing. Furthermore, the procedural barriers to justice faced under the French law are not addressed such as a reversal of the burden of proof.

106 Danish Institute for Human Rights, *Legislating for impact: analysis of the Proposed EU Corporate Sustainability Due Diligence Directive* (March 2022) p. 13

Recommendations

In order to ensure that the LdV can be effectively implemented in line with its objective to prevent human rights violations by corporations, it is crucial that it is interpreted in a way that centres the needs and perspectives of rights-holders. As has been documented in this report, in the context of energy and extractive projects, there is a real risk that an overly narrow interpretation of the law will deny protections to the most vulnerable groups, including human rights defenders.

As more mandatory human rights due diligence laws are introduced across Europe, legislators have the opportunity to consider the strengths of the French law in seeking a preventative objective, while ensuring that its weaknesses are not replicated elsewhere. This is particularly pertinent in view of the proposed European Directive on Corporate Sustainability Due Diligence.

FOR JUDGES, WHEN CONSIDERING CASES UNDER THE LDV

- Pursue an interpretation of the LdV in accordance with its overarching objective to prevent harm to people and planet caused by corporate activities. In practice, this requires assessing whether the measures taken by corporations to fulfil their vigilance obligation are adequate, efficient and effectively implemented to prevent human rights violations and environmental harm, in light of the context in which the alleged violations have taken place.
- Refer to the UN Guiding Principles on Business and Human Rights and the OECD Guidelines as the authoritative guidance for the interpretation of the vigilance obligation, using these internationally accepted standards to resolve existing definitional ambiguities in the law with regard to scope and substance.
- Recognise the importance of a rights-holder-centred interpretation of the vigilance obligation that adequately addresses structural harm caused by corporations, and provides access to justice for victims in the event of serious damage, in line with French and European commitments to protect fundamental rights and the environment.
- In urgent situations where impacted communities are at risk of ongoing or imminent harm due to corporate activities, provide interim relief through conservatory measures that order the suspension of project activities until corporations comply with their vigilance obligation.

IN THE SPECIFIC CONTEXT OF VIOLATIONS OF FPIC AND ATTACKS AGAINST HUMAN RIGHTS DEFENDERS

- Interpret the concept of "human rights and fundamental freedoms" taking into account contextualised international human rights standards. This includes the concepts of collective land rights and FPIC as recognised under international law, when corporations are pursuing projects that are located on or near Indigenous or tribal lands.
- Ensure that legal actions on compensation of damages claimed under the LdV allow for compensation of individual damages drawing from collective rights.
- Actively seek to define the scope of the risk assessment to be conducted under the LdV by taking into account the consequences of certain corporate practices for the exercise of specific rights or the fuelling of existing violations in a given context.
- Interpret the scope of the vigilance perimeter in a way that takes into account the realities of transnational business activities, including non-commercial partnerships outside of a supply chain context. For example, direct and indirect business relationships between multinational corporations and individual landowners aimed at gaining access to land for extractive projects.
- Recognise the specific vulnerabilities of Indigenous peoples and human rights defenders when assessing whether corporations have taken all reasonable measures to identify and prevent human rights and environmental harms linked to their activities and supply chains. In addition, take into account the specific risks faced by vulnerable and marginalised groups seeking to access remedy in French courts, such as intimidation, threats and violence.

IN THE CONTEXT OF THE EU LEGISLATIVE PROCESS ON MANDATORY HUMAN RIGHTS DUE DILIGENCE: TO EUROPEAN POLICY-MAKERS AND THE FRENCH GOVERNMENT

TO EUROPEAN POLICYMAKERS

- Require EU Member States to impose a concrete obligation on companies to take all necessary, adequate and effective measures to prevent human rights and environmental violations, resulting from their activities and the activities of companies throughout their value chain. This obligation should cover the activities of the companies subject to the Directive, entities in their value chain, as well as direct and indirect business partners.

- Ensure that the rights and impacts that fall under the scope of the legislation cover the full spectrum of international human rights as specified in the UNGPs, by adopting an open non-exhaustive definition of adverse human rights impacts. Furthermore, the list of instruments should include specific protections of Indigenous peoples by referring explicitly to FPIC and include UNDRIP and ILO Convention 169 in the Annex.
- Provide access to justice through civil liability which would allow for a broad set of adequate and effective remedies including reparation as well as injunctive and conservatory measures.
- Address procedural barriers to justice experienced under the French law, taking into account the specific challenges faced by rights-holders as a result of vulnerability and marginalisation by allowing courts to reverse the burden of proof for civil liability when claimants provide prima facie evidence.
- Mandate meaningful consultation with stakeholders informing all stages of due diligence. The due diligence obligation must be strengthened to include meaningful and ongoing engagement with stakeholders, including mandatory and proactive consultation with workers, trade unions, Indigenous communities and other relevant or affected groups. This engagement must take into consideration the barriers that specific vulnerable groups face.

TO THE FRENCH GOVERNMENT

- Strengthen the duty of vigilance of all forms of private and public corporate actors under French law by requiring that they adopt and effectively implement all necessary measures to identify, prevent and mitigate human rights and environmental violations within their corporate group and value chain.
- Ensure that sufficient material, financial and human means are mobilised for the adequate implementation of the LdV, including resources for capacity building of judges.
- Strengthen parliamentary oversight of the implementation and enforcement of the vigilance obligation by creating a special rapporteur position within the Sénat and the Assemblée Nationale
- Continue to push for the adoption of ambitious European legislation to establish a corporate duty of vigilance and ensure effective access to justice for any affected person or community.
- Provide constructive and proactive support in the negotiations for the UN Binding Treaty, and work towards the development of an ambitious EU common negotiating position, starting with the establishment of a mandate to negotiate.
- Ratify ILO Convention 169 on the protection of Indigenous peoples' rights, and specially the right to FPIC.

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