

THE LAW
ON DUTY OF VIGILANCE
OF PARENT AND OUTSOURCING COMPANIES
YEAR 1:
COMPANIES MUST DO BETTER



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4 **INTRODUCTION**

6 **PART 1.**

General summary of the plans published and how they conform to the law

- 1/** The content of the law P.7
- 2/** General summary of the implementation of the law: broadly insufficient plans P.10

20 **PART 2.**

Sectoral analysis

- Extractive sector P. 20
- Arms sector P. 25
- Agri-food sector P. 30
- Banking sector P. 35
- Garment sector P. 40

46 **GENERAL CONCLUSION AND PROSPECTS**

INTROD

For many years now our organisations have been documenting cases of human rights abuses by multinationals, as well as the many ways in which the victims' access to justice has been restricted. The tragedy in Bhopal, India, the dumping of toxic waste in the Ivory Coast, the pollution caused by the Erika tanker on the French coast, dumping by Shell in Nigeria and by Chevron/Texaco in Ecuador, or even the much publicised collapse of the Rana Plaza in Bangladesh are emblematic and dramatic examples of this. Recently, in January 2019, a new mining catastrophe in Brumadinho in the state of Minas Gerais shook Brazil and claimed 300 lives¹. These cases demonstrate that the national and international regulatory framework in general do not allow for the economic players to be held responsible when it comes to human rights or for payments for damages to be requested wherever they may have occurred in the world.

This situation reveals that voluntary standards, only framework that currently exists on an international level, are not enough to prevent the human rights abuses and environmental damages committed by companies. A legally binding framework is therefore necessary.

Transnational corporations carry out activities in multiple countries and therefore depend on multiple jurisdictions. Organised in groups of companies via long and complex chains of subcontracting in different countries²,

the activities are distributed between branches, subcontractors, suppliers and other commercial partners. As these are supposedly independent legal entities, each under disparate jurisdictions, the parent and outsourcing companies are not held legally responsible for any serious acts of environmental and human rights abuse committed by their subsidiaries or by other companies within their sphere of influence (subcontractors, suppliers, etc.). Indeed, the independence of the legal person allows the parent company to be protected from any

A legally binding framework is therefore necessary

action taken against it as a result of its subsidiary's actions. This 'corporate veil', in reality, is a major obstacle for anyone representing the victims in their search for justice and compensation.

The French law on the corporate duty of vigilance of the parent and outsourcing companies (Law No. 2017-399 of 27 March 2017)³ wanted to address this issue. By placing the burden of responsibility of prevention on the multinational and, above all, by incurring its civil liability for the

impact of its activities – including those of its subsidiaries, suppliers and subcontractors, wherever they may be in the world – it is the first legislation worldwide that proposes surpassing the independence of the legal entity. This law is based in particular on the United Nations' Guiding Principles on Business and Human Rights (UNGPs)⁴, which is currently the internationally recognised standard of reference on this matter. Unanimously passed by the United Nations Human Rights Council in 2011, these non-binding guidelines affirm the central role of the government in the protection and promotion of human rights in companies, the priority of a risk-based approach for third parties, and the extended liability within the value chain, and emphasise that it is mandatory for companies to respect human rights by recognising that their liability extends to their business dealings as a whole.

France is the first country to have adopted legislation such as the law on duty of vigilance. Other similar initiatives are being developed across Europe and the world. However, in order to be efficient on a global level, an international binding treaty would be necessary so that all companies everywhere in the world could be held accountable for their actions and subject to effective sanctions. A crucial step regarding this was taken when on 26 June 2014, following the initiative of Ecuador and South Africa, the United Nations Human Rights Council adopted the 26/9 resolution establishing an

1. This catastrophe arrives three years after Samarco's mining dam collapse in Mariana, involving the same mining giant, Vale, and when the victims from 2015 are still awaiting compensation. See the press release of 26 January 2019 from MAB (Movement of People Affected by Dams) in Brazil: <http://www.mabnacional.org.br/noticia/le-mouvement-des-personnes-affect-es-par-les-barrages-d-nonce-le-nouveau-crime-commis-par-va>

UCTION

intergovernmental working group with this aim. Mandated to “elaborate an international, legally binding instrument to regulate, under international human rights law, the activity of transnational corporations”, this working group achieved a historical milestone when in its fourth session in October 2018, for the first time in the UN’s history, the member States opened negotiations for a first draft treaty.

Until such a treaty is adopted, the French law on duty of vigilance presents the first opportunity worldwide to prevent as best as possible the important risks associated with multinationals’ activities and to grasp the complexity of their structures and value chains.

The purpose of this study is to produce a summary of the first year in which this new legislation has been implemented in France. Our general observation is that the first plans published in 2018 only very partially meet the objectives and requirements of the law, notably in terms of identifying the risk of abuse, their location, and measures put in place to prevent them. Our organisations thus wish to express here their expectations when

it comes to the concerned parties, both the government and companies, in order for the implementation of this law to meet its principal objective: the prevention of violations of fundamental rights to fundamental rights and environmental damage.

This study is not an exhaustive review of all the plans published in this first year of implementation. Our organisations have chosen to select certain large companies operating in specific sectors due to their high risks of human rights abuses and damage to the environment that we have documented using information gathered in the field.

In the first section, the study gives a general analysis of the vigilance plans published in order to determine the positive elements and shortfalls and to present our main observations and recommendations.

The second section presents sectoral analyses to underline the specific challenges in sectors particularly at risk: garment, food industry, arms, weapons and extractive industries. In each sector, the vigilance plans of three companies have been analysed.

2. See the ITUC report on 50 of the largest transnational companies which shows that they only directly employ 6% of workers; 94% are employed by subcontractors and supplier : <https://www.ituc-csi.org/frontlines-report-2016-scandal?lang=en>

3. The text of the law on duty of vigilance is available here: <https://www.legifrance.gouv.fr/eli/loi/2017/3/27/2017-399/jo/texte>

4. The text on the UNGPs can be found here: https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_fr.pdf



Part 1

**General summary
of the plans
published
and how they
conform
to the law**

1

THE CONTENT OF THE LAW

The law on duty of vigilance concerns companies established in France with over 5,000 employees in France or 10,000 employees in the world (within the companies and their direct and indirect subsidiaries). There may be around 300 of these companies, but since no comprehensive list of companies subject to this law has been published – despite many requests for such by our organisations and MPs made to the Ministry of Economy and Finance – we can only make an estimate.

The law creates a legally binding obligation for parent and outsourcing companies to identify and prevent human rights abuses and damages to the environment resulting not only from their own activities but also from that of companies that they directly or indirectly control as well as activities of the subcontractors and suppliers with which they have an established commercial relationship both in France and in the world. It therefore establishes a legal obligation of prudent and diligent conduct.

In order to do this, the French companies concerned are obliged to establish, publish and efficiently implement an annual vigilance plan, included in their management report, as well as a report on the implemen-

tation of this vigilance plan. In case of non-compliance, the civil liability of the company may be incurred before a French judge and then, if need be, the company may be ordered to repair damages caused and compensate the victims. Before any damage, if the company does not establish its vigilance plan, make it public or efficiently implement then it can be obliged to do so by a judge if necessary, with financial penalties.

The law defines a minimum content for the vigilance plan and conditions regarding how it should be elaborated:

« The plan shall include adequate, reasonable vigilance measures to identify risks and to prevent serious impacts on human rights and fundamental freedoms, the health and safety of individuals and the environment, resulting from the activities of the company and of the companies that it controls, within the meaning of article L.233-16 II, directly or indirectly, as well as the activities of subcontractors or suppliers with whom they have an established commercial relationship, when these activities are related to this relationship.

« The plan should be elaborated in cooperation with the company's stakeholders, and where appropriate, as part of multiparty initiatives that exist in the subsidiaries or at a territorial level.

It shall include the following measures:

« 1° A mapping of risks designed to identify, analyse and prioritise them;

« 2° Procedures to regularly assess the situation of subsidiaries, subcontractors or suppliers, in line with the risk mapping, with whom the company maintains an established commercial relationship;

« 3° Appropriate actions to mitigate risks or prevent serious impacts;

« 4° A whistleblowing mechanism that collects reports of existence or materialisation of risks, elaborated in consultation with the representative trade unions organisations within the company;

« 5° A system monitoring the implemented measures and evaluating their effectiveness.

« The vigilance plan and the report on its effective implementation must be published and included in the report mentioned in Article L.225-102.»

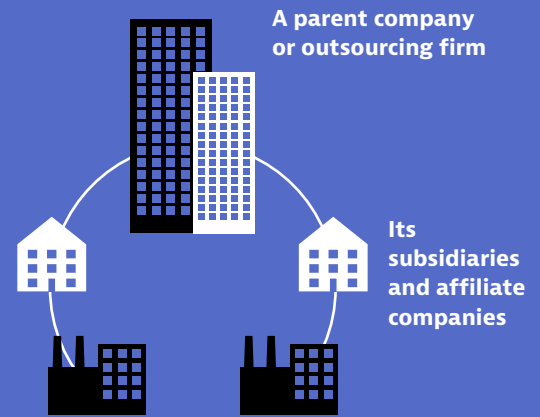
Extract from Article 1 of the law of 27 March relative to the duty of vigilance (article L. 225-102-4.-I inserted in the Commercial Code).

No complete list of companies subject to this law has been published

UNDERSTANDING THE DUTY OF VIGILANCE

Civil society would have preferred a more ambitious bill. However, despite its flaws, the French corporate duty of vigilance law is undeniably a groundbreaking law on the international stage, and constitutes a major historic step towards ensuring that the rights of communities, workers and the environment are respected by multinational corporations. Indeed, French parent and outsourcing companies can finally be held legally accountable for harms to people and the environment caused by their activities, as well as those of their subsidiaries, subcontractors and suppliers abroad, and taken to court if necessary.

SCOPE THE LAW CONCERNS THE ACTIVITIES OF:



COMPANIES CONCERNED

ANY COMPANY WITH:

More than 5,000 employees in France

or more than 10,000 employees worldwide

TYPES OF VIOLATIONS

THE LAW COVERS ALL BUSINESS SECTORS AND COVERS SERIOUS VIOLATIONS OF:



Human rights and fundamental freedoms



Health and safety of persons



The environment



The scope is wide-ranging, unlike other laws which are limited to a particular sector – the extractive sector, for example – or only certain types of violations (corruption, child labour, etc.).



As this threshold is very high, certain companies in high-risk sectors (such as the extractive or garment industry) are not affected.



This represents a major breakthrough! The law now recognises that parent companies or outsourcing firms are legally responsible for their subsidiaries, suppliers and subcontractors, both in France and abroad.

This infographic comes from the report of the Friends of France and ActionAid France- Peuples Solidaires: *End of the road for transnational Corporations ? Human rights and environment: from a groundbreaking french law to a un treaty* (October 2017), available here: https://www.amisdelaterre.org/IMG/pdf/end_of_the_road_for_tncs_foef-aaf-oct17.pdf

LEGAL ACTIONS

WHO CAN REFER A CASE TO COURT?

Anyone with legal standing before a French court ("*intérêt à agir*"):

Organisations defending human rights and the environment

The victims themselves

Trade unions



The law provides for proceedings before a French court even for victims abroad.



A case may be referred even before damages have occurred. The information published in the vigilance plans may be used as evidence in the event of damages.



The burden of proof still falls on the claimants.

WHAT ARE THE PENALTIES INVOLVED?

After a company has failed to respond to a formal notice to comply with the law, a judge may force it to meet its obligations.

The civil liability of the company may be incurred, and the company may be ordered to pay damages to the victims.



There is an obligation of means rather than of results: conviction may only occur when a vigilance plan is incomplete, inexistent or ineffectively implemented.



There is no provision for criminal proceedings in the law.

OBLIGATIONS

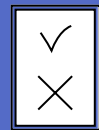
THE VIGILANCE PLAN SHOULD INCLUDE:



Risk-mapping



Appropriate actions to mitigate risks and prevent serious violations



Measures to monitor and assess actions taken



Procedures to regularly assess the situation of subsidiaries, subcontractors and suppliers



A whistleblowing mechanism that collects reports of potential and actual risks

TIMEFRAME

2018

1ST plans published

2019

1ST potential legal actions



This is not just ex-post reporting, but an ex-ante prevention plan. Companies must not only adopt measures but follow up on the measures implemented and assess their effectiveness.

Vigilance plans and reports on their implementation are made public and included in companies' annual reports.

For a more detailed explanation, see the document published by the European Coalition for Corporate Justice (ECCJ), *French Corporate Duty of vigilance Law - Frequently Asked Questions*, available here (2018) :

<http://corporatejustice.org/news/405-french-corporate-duty-of-vigilance-law-frequently-asked-questions>

2.

GENERAL SUMMARY OF THE IMPLEMENTATION OF THE LAW: BROADLY INSUFFICIENT PLANS



Certain corporations have not yet published a vigilance plan regardless of their legal obligation to do so (e.g. Lactalis, Crédit agricole, Zara or H&M).

Our organisations have reviewed 80 vigilance plans⁵, allowing us to make a general analysis following the first year of implementation of the law.

Unfortunately, we find that the objectives of the law are only very partially taken into account. The first plans are very heterogeneous, indicating that, faced with this new exercise, each company has applied this law with different stringency levels, with the majority of the plans still focusing on the risks for the companies rather than those for thirds parties or the environment.

According to Sherpa's recently published guidelines for vigilance plans⁶, the plan should on the one hand be readable and accessible and on the other hand be transparent, exhaustive and sincere. Finally, many company directors and stakeholders should be involved in this exercise.

In terms of the content and implementation of the plan, it should have:

- **A detailed risk mapping mentioning the risks for third parties and the environment;**
- **A regular and continued evaluation of the subsidiaries, subcontractors or suppliers with respect to the risk mapping;**
- **The implementation of effective measures and a mechanism to monitor them;**
- **Functional and safe whistleblowing mechanisms.**

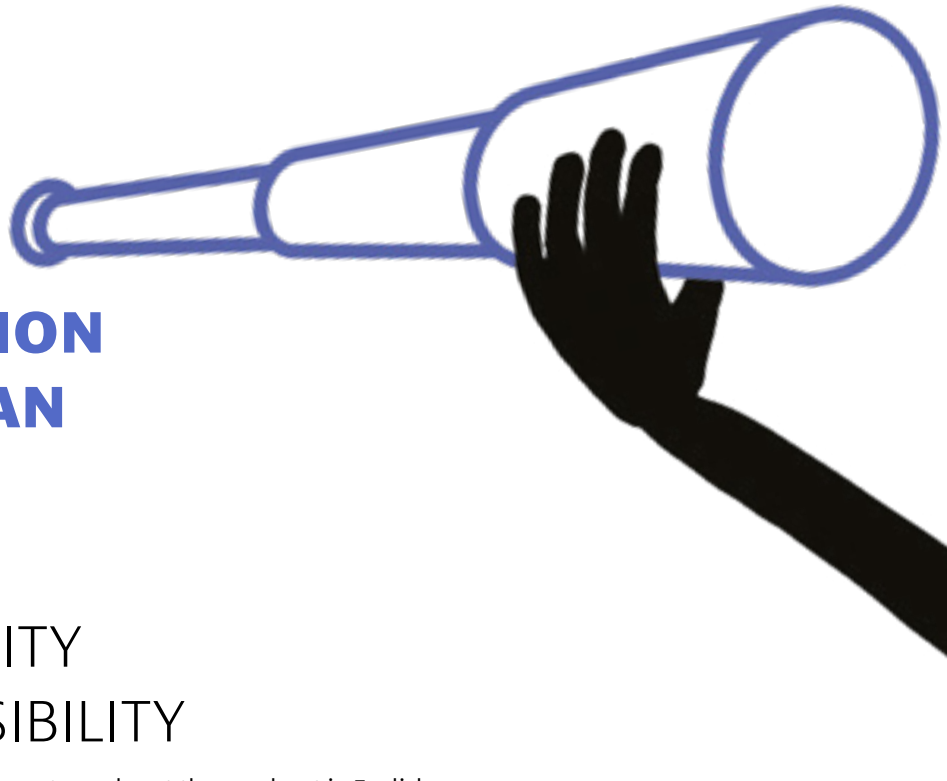
It is in accordance with these principles that civil society, and also the stakeholders and victims faced with these risks, will assess whether the plans published comply and are in accordance with the law.

5. Cf. list published in annex

6. Vigilance Plans Reference Guidance, Sherpa, December 2018: <https://www.asso-sherpa.org/publication-guide-de-reference-plans-de-vigilance>

A

ELABORATION OF THE PLAN



1/ READABILITY AND ACCESSIBILITY

All companies subject to the law must implement and facilitate access to their vigilance plans. To this effect, the vigilance plan is integrated in the annual report. However, in addition to being published in the management report, there should be a separate document with the plan that can be downloaded from the Group's website. The company should also distribute the plan to its commercial partners, which would imply making the document available not only in French but

also at the very least in English.

All relevant information concerning duty of vigilance must be included in the plan and in the section of the annual report that concerns it.

Any information referenced when redirected to other sections of the annual report is also considered part of the vigilance plan. Nevertheless, for the sake of ease of reading and accessibility, this type of referencing should be avoided.

OUR ASSESSMENT

The majority of the plans reviewed are only a few pages long, generally included in the chapter on social and environmental responsibility within the companies' annual report. Most of them are not full separate plans in themselves, but rather a collection of information making reference to other chapters on disclosure of non-financial performance, notably the chapter on « purchases », and to other information outlets: the risk factors section of the annual report, integrated activity report, CSR report or website, dedicated documents...

This means that reading the plans involves constantly flicking back and forth between documents and therefore makes them hard to read. Furthermore, it makes it difficult to assess the different measures that the companies have put in place.



2/ TRANSPARENCY, COMPREHENSIVNESS AND SINCERITY

The plans should be as transparent as possible and include an exhaustive list of the controlled companies: the number of employees, the nature of their activities, their location, any related risks and violations.

Beyond the group, the scope of obligation includes any subcontractors and suppliers that have established commercial relationships with the outsourcing company and its direct or indirect subsidiaries. Just as for the controlled companies, the outsourcing company must make an effort to provide a list

of their partners, indicating precisely which ones pose risk factors based on their activities, the countries in which they are established, etc.

These lists should be included in the plan itself or in an annex or, failing that, the plan can contain a link that redirects to a website with the list.

Finally, the plan must be as sincere and precise as possible. Our organisations believe that a vague plan does not meet the requirements of the law.

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OUR ASSESSMENT

Our report demonstrates that the majority of plans published in 2018 are insufficient: they are not precise enough and often contain gaps. The majority do not define the scope of the plan, notably with regard to suppliers and subcontractors. However, on certain points some companies have presented interesting analyses and methods which are more in line with the obligations established by this law.



3/ GOVERNANCE OF THE PLAN: INVOLVING STAKEHOLDERS AND VARIOUS DIRECTORATES OF THE COMPANY.

Stakeholders should be involved in every step of the plan. Stakeholders are individuals, groups or communities whose rights and obligations or interests are, or can be, affected by the company's activities.

Companies should publish a list of internal and external stakeholders, in particular the local stakeholders who are involved in the establishment and implementation of each measure of the plan, and they should indicate the methodology used to choose the stakeholders, notably the selection criteria and consultation methods.

Hence, the company should provide details on the frequency, spaces and type of interaction preferred: prior information, interviews, hearings, consultations, questionnaires, discussions in boards of directors, social and economic committees, European works councils... Consulting stakeholders should not be instrumentalised: a

simple informative meeting cannot be considered as a real consultation⁷, and the fact of a stakeholder being listed should not be interpreted as them backing the vigilance plan.

The law also foresees resorting to multi-stakeholder initiatives within sectors or at a territorial level. The company should publish a list of these initiatives as well as a critical evaluation of the stakeholders involved, the specifications of the initiative and its governance, the quality of complaints mechanisms and the degree of transparency.

The participation of or resorting to multi-stakeholder initiatives does not exonerate the company from carrying out its own due diligence on its activities and implementing specific measures.

Finally, the law does not provide for any internal organisation or governance of the plan. However, it is important to

have a global involvement of different departments in order to efficiently cover all aspects of vigilance and to put it in place in an appropriate manner. Above all, duty of vigilance and respect of human rights and the environment must be taken into account at the highest level and integrated into the company's strategic decisions.

7. See the analysis on the extractive sector in the second part of this review.

OUR ASSESSMENT

We can conclude that the identification and consultation of stakeholders has been fairly overlooked in the plans that were published last year – most likely because the law does not impose it, as it only contains one phrase inciting this: « *the plan is meant to be elaborated in conjunction with the stakeholders of the company, where appropriate as part of multi-stakeholder initiatives within sectors or at territorial level.* »

As a result, some companies do not mention their stakeholders at all in the part dedicated to risk mapping, whereas others show their efforts to involve the stakeholders in the process of elaborating the mapping. Some companies mention their policy of « *dialogue* » with stakeholders in the general operation of their activities, but the majority of the plans reviewed do not give precise enough information on the involvement of stakeholders in elaborating the plan.

In addition, few companies have indicated which human, technical and financial resources have been allocated to the implementation of the measures and the evaluation of their effectiveness.



B

CONTENT OF THE VIGILANCE PLAN

1/ A DETAILED RISK MAPPING STATING THE RISKS FOR THIRD PARTIES AND THE ENVIRONMENT

Companies subject to the law should not merely say they have done a risk mapping. They should publish their risk mapping, explicitly and clearly stating the serious risks to and severe impacts on human rights and fundamental freedoms, health and safety of individuals and on the environment. For example, the plan should provide detailed lists of risks for each type of activity, product and service.

It is these substantial risks, i.e. negative impacts on third parties and the environment deriving from general activities, on which vigilance must be exercised and which the plan must cover.

The notion of risks, as defined by the law on duty of vigilance, must not refer to legal, reputational or financial risks for the company. The risks in question do not concern those for investors,

which should be published in the annual reports of listed companies. The risks that must be mapped are risks for third parties (employees, the general population and the environment).

The company should indicate its methods of analysis, evaluation and prioritisation of the risks. This must include the evaluated severity criteria regarding the level, size and reversible or irreversible nature of the impacts, or the probability of the risk. This prioritisation should allow the company to structure how it implements its measures to resolve the impacts or risks of impact.

Lastly, the company should mention all risks, including environmental ones. In the second part of this review we show that these are too often left out or only mentioned in an anecdotal way.

Evasive, imprecise or incomplete mappings which do not refer to the activities or countries in which the company actually operates are not useful tools for the populations whose rights could be impacted by the Group's activities. Rather, the mapping should be detailed, with a list of the countries at risk among those where the company is established, and a list of the specific risks of each type of activity of the company. Without this, the mapping included in the plan is neither an adequate means of risk prevention nor appropriate for addressing the impacts at stake.

Companies subject to the law should not merely say they have done a risk mapping

OUR ASSESSMENT

Most of the companies reviewed merely transpose their reporting practices or social liability commitments into their vigilance plans. Even more worrying is that the companies have frequently stated the risks that possible human rights abuses could cause for the company and its performance, when it is in fact the risks provoked by the company regarding human rights abuses and damage to the environment that should be the subject of these plans.

In more than two thirds of the vigilance plans reviewed, the methods for identification of risks are insufficient or even non-existent. For many companies, a materiality matrix is used for prioritisation of issues, i.e. according to stakeholder expectations and the importance of these issues for company performance. Rare are the companies, like Eramet, that clearly state that the evaluation of the risks in the framework of a vigilance plan « *involve an assessment of the severity of the impact, not directly for the Group, but for the potentially affected third party(ies) (employees, local residents or other people)* »⁸.

Even when the risk mapping methods are described in detail, they do not actually present the results. It is therefore not possible to determine precisely what are the substantial risks related

to the company's activity or geographical location, as we demonstrate in the second part of our review which looks at various sectors. We thus do not really know which countries are considered at risk among those within which the company operates, just as there is no information available concerning the industrial sites, activities or projects which pose risk of serious human rights abuse or damage to the environment. Is there, for example, an ongoing project which involves significant displacement of populations, situated in a conflict area or an ecologically sensitive area? Some companies merely give examples but without justifying their relevance.

8. Eramet's Annual Report 2017, p.337:
<http://www.eramet.com/publications/eramet-document-de-reference-2017>



2/ A REGULAR AND CONTINUOUS EVALUATION OF THE SITUATION OF SUBSIDIARIES, SUBCONTRACTORS OR SUPPLIERS IN VIEW OF THE RISK MAPPING

Audits can be one of the tools employed, and it is up to each company to determine the number, frequency and accuracy of audits conducted in order for them to comply with their duty of vigilance.

In any case, and taking into account the numerous reports from international organisations highlighting the shortfalls and weakness of using audits to manage risks, they should be deve-

loped using methods and benchmarks which allow them to be effective⁹.

Whatever means of evaluation the company chooses to use, it should mention the following elements in its plan: the tools chosen (audits and/or others), methodology, objectives, timetable of the evaluation processes, criteria and results of evaluation (the situation of subsidiaries, suppliers and subcontractors).

The company must indicate the corrective measures adopted if necessary and the timeline of their implementation, as well as the way in which the company has made strategic changes in order to comply.

9. See the analysis of the garment industry in the second part of this study.

10. Cf. Code of commerce, article L225-102-1, III and the decree R225-105

OUR ASSESSMENT

The law explicitly requires a regular evaluation of the value chain. The reviewed plans do not make a clear distinction between the vigilance policies from their subsidiaries and those from their suppliers and subcontractors; in general, the vigilance plans redirect to the policies of « *responsible purchases* » described in the non-financial performance statement¹⁰, and present their policies with regards to their suppliers only. Occasional evaluation measures are not enough to meet the legal requirements. This provision must be linked to the fifth point of the law, the system for monitoring the measures. And yet, the indications on the timetable and frequency of this evaluation are scarcely (if at all) provided in the first plans reviewed.

3/ APPROPRIATE ACTIONS TO MITIGATE RISKS OR PREVENT SEVERE IMPACTS

The measures put in place by the company must vary in nature: preventive, mitigation and remediation measures.

These measures must be developed in view of the risk mapping so as to address, point by point, the risks identified.

As for the evaluation of the subsidiaries, subcontractors and suppliers, the steps presented in the plan must include the corrective measures and the timeline of their implementation.

Furthermore, it is advisable to mention the whole normative framework of reference. The majority of international standards, sectoral or not, do contain frames of reference for actions and measures to put in place when it comes to specific risks (for example, the International Finance Corporation's standards on land acqui-

sition, population displacement and compensation).

However, these standards are sometimes insufficient and, above all, the fact of mentioning them does not exempt the company from including the risks and impacts it has identified as well as the measures chosen and put in place to address them.

Finally, vigilance must be exercised throughout the entire year, and not only when reediting the plan. The plan must also be revised over the course of the year if risks have developed, if there have been impacts, or if measures to remedy them have been taken.

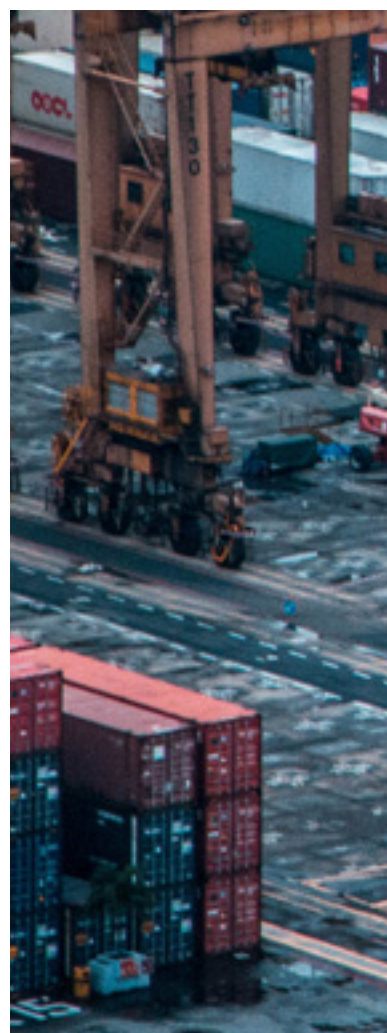
11. See the analysis of the banking sector in the second part of this review.

Vigilance must be exercised throughout the entire year

OUR ASSESSMENT

In many plans, the actions and measures are not detailed enough and only very partially address the risks mentioned in the mapping. Some companies indicate the policies and voluntary commitments they have adopted to address the specific risks in certain sectors that fall within their sphere of influence, such as banks' sectoral policies, for example¹¹.

It is important, however, to underline that the content of these policies is generally insufficient and must therefore be improved to meet the vigilance obligations decreed by the law.



4/ FUNCTIONAL AND SAFE WHISTLEBLOWING MECHANISMS

In order to give an appropriate and rapid response to concerns, problems and actual violations, the law on duty of vigilance contains provisions for a whistleblowing mechanism. This is a key element of the vigilance system. Collaborating with trade unions on the development of the whistleblowing mechanism is a legal obligation.

Depending on its scope of vigilance, the company must foresee one or more effective whistleblowing mechanisms that allow information to be escalated to the management in order to ensure that mitigation measures are updated. Companies must publish a list of the various mechanisms and procedures, the intended audiences and the conditions of implementation (accessibility, confidentiality, etc.).

They must ensure the accessibility, accountability, coherence and independence of the mechanism(s). The

information must be widely spread both internally and externally to each intended recipient in an appropriate and accessible manner.

They must make sure to implement an effective governance of these mechanisms, and the best way is to provide the details of this in their plan: is it managed from the headquarters? Are there staff representative bodies present? What relationships are established with staff representatives in concerned countries? Is there a delegation for external bodies? How independent is this body from the company directors? What measures are in place to protect whistleblowers and other individuals who use these mechanisms, in particular regarding guarantees of anonymity and absence of reprisals?

The company should make a distinction between the mechanisms for risks

and the mechanisms for violations, and establish the proper procedures, guarantees and timelines for treating each one.

To demonstrate the effectiveness of these mechanisms, the plan must contain indicators on how reports are taken into account in identifying and responding to risks of violations or actual violations, such as publication of processed and anonymised cases.

Any participation of stakeholders in the development and monitoring of whistleblowing and reporting mechanisms must be specified.

OUR ASSESSMENT

In parallel to the law on duty of vigilance, the law relating to transparency, the fight against corruption and modernising economic life (known as Sapin II law) also demands the implementation of a whistleblowing mechanism. This explains why certain companies explicitly refer to the Sapin II law in their vigilance plan and declare the intention to establish a whistleblowing mechanism that simultaneously meets the requirements of both laws. The type of whistleblowing mechanism can vary. The most common mechanism is the provision of an email address.

Such a mechanism has been established, for example, by Galeries Lafayette, Engie, Casino, Total, Schneider Electric and Orange. This type of mechanism falls short due to the problems that it can pose in terms of accessing it: it requires knowing the email address, written communication, having Internet access, etc. Other companies have put in place more diverse channels of communication to directly contact those responsible for ethical issues, compliance or other bodies of the Group. But these mechanisms are generally inaccurate and, most of the time, are not available to third parties (the communities which are in particular affected).

Regarding consultation with the trade unions, although one would expect all the plans to indicate that this took place (or that it is foreseen in the near future), as it is a legal requirement, the majority of the plans reviewed do not mention it.

5/ A SYSTEM MONITORING THE IMPLEMENTED MEASURES AND EVALUATING THEIR EFFECTIVENESS

From the second year of the law coming into force, i.e. 2019, the vigilance plan must be accompanied by a report on its effective implementation and contain specific indicators demonstrating the effectiveness and efficiency of the plan's measures. But in this first year, the companies should have presented the systems for monitoring the implementation of measures and the evaluation of their effectiveness.

Indeed, elaborating a vigilance plan differs from reporting and providing information on statements of non-financial performance. It is not an activity report, but rather a report on the effectiveness of the measures put in place.

In this regard, the law provides that « a system monitoring the implemented measures and evaluating their effectiveness » must be established, effectively implemented and published. This provision concerns all the identification and prevention measures implemented. The monitoring and evaluation system must therefore cover all the plan's measures from the identification and evaluation measures of the risk mapping to the whistleblowing mechanism the evaluation procedures of suppliers and subcontractors, and every other measure related to duty of vigilance.

The company must check the effectiveness of these measures and must therefore put in place a methodology and means for this. For example, it

must establish a timeline and indicators of means, process and results that allow it to monitor the effectiveness of the measures and foresee corrective measures. It must make sure that sufficient human, technical and financial resources are allocated to measuring the effectiveness of these measures.

The company must check the effectiveness of these measures and must therefore put in place a methodology and means for this

OUR ASSESSMENT

In these first plans, some companies do not mention at all the envisioned system for monitoring the implemented measures and evaluating their effectiveness at all. Most of the others explain that the system for monitoring the measures is still being developed, without giving information on the parties involved, the methodology or the timeframe.



Part 2

Sectoral Analysis

EXTRACTIVE

SECTOR



PLANS REVIEWED:

Eramet:

https://www.eramet.com/system/files/publications/pdf/280318_eramet_ddr2017_vf2_1.pdf

Orano (ex-Areva):

https://www.orano.group/docs/default-source/orano-doc/finance/publications-financieres-et-reglementees/2017/orano_rapport-annuel-activite_31-12-17_avec-annexes.pdf?sfvrsn=14d9a171_10

Total:

<https://www.sustainable-performance.total.com/fr/plan-de-vigilance>

INTRODUCTION

The extractive industry (mining, oil, gas) is, on a global level, one of the most worrying in terms of human rights abuses (forced evictions and land grabbing, intimidation, criminalisation and assassinations of human rights defenders, etc.), health impacts and environmental damage (massive pollution, deforestation, global warming, etc.).

It is also an industry that has been tainted by numerous corruption and tax evasion scandals whose consequences on the independence of institutions and the budget of many countries directly impact the fundamental rights and needs of the

population and, sometimes, their access to justice and compensation. The United Nations Special Representative on business and human rights, Mr John Ruggie, had signalled the fact that the extractive industry alone accounts for almost a third of human rights abuses by companies worldwide. Similarly, Ms Margaret Sekaggya, then UN Special Rapporteur on the situation of human rights defenders, drew attention to the extractive industry, denoting numerous complaints against the security services employed by mining and oil companies.

Here we have reviewed the plans of Eramet, Orano (ex-Areva) and Total,

the largest French extractive corporations, concentrating specifically on the problems linked to their extraction sites. The three companies have other activities as well, primarily the transformation of extracted mineral ores or hydrocarbons, which also pose major impacts on the health and safety of workers and local populations as well as on the environment and climate.

**The extractive industry
alone accounts
for almost a third
of human rights
abuses by companies
worldwide**



GENERAL ANALYSIS OF THE PLANS



The plans of these three companies vary greatly in quality.

To begin with, the vigilance plan of Orano (ex-Areva) is unfortunately a very clear example of what not to do. Firstly, it is not presented in a readable and accessible manner since the information that is meant to address the obligations established by the law on the duty of vigilance is mixed up with other information, notably the points addressing the obligation of non-financial reporting. Above all, the company has not mapped the risks of impacts on human rights and on the environment, but rather the risks that could affect the company: « *all foreseeable or incidental situations or events that could impact the safety of staff, the financial results of a Business Unit or the group, and its brand image* ». Following this logic, the company's first response to these risks is therefore to resort to insurers and reinsurers. More broadly, the management of risks is only done using a set of internal audits and procedures. Lastly, the measures presented only concern one part of the Group's activities.

The content of Total's plan is too vague,

with a fairly weak risk mapping which is not applied to the actual activities and countries in which the company operates. As regards evaluation and monitoring measures, the company has resorted to external agencies such as the Danish Institute for Human Rights or CDA. Total also refers to having published a « *Human Rights report* »¹² which presents the major impacts its activities have had on human rights and the remedial measures deployed. The main findings and measures detailed in this report should be presented in the vigilance plan.

Finally, in terms of structure, Eramet's plan appears to be the most accomplished. It is presented in annex to the company's annual report and is therefore easily accessible, it is methodical and easy to read, it lists the different industrial and mining sites of the company, and, in general, it is much more detailed than the average plan. However, as with the other plans, the system for monitoring the implemented measures and evaluating their effectiveness is still insufficiently developed and essentially relies once again on internal reporting systems and audits. Nevertheless, the company stresses

that this system should be completed in the future. Various gaps in the content of the plan compromise its quality and therefore the company's ability to prevent certain major risks of impacts on human rights and the environment.

As for all companies, an evaluation of concrete implementation in the field is of course equally necessary.

As indicated in the introduction, the adverse impacts on human rights, fundamental freedoms, the health and safety of individuals and the environment are very many and varied in the extractive industry. In this review we cannot discuss in detail every type of violation found in this sector and have therefore chosen to concentrate on two fundamental aspects: firstly the respect for the rights of local communities and the issue of land grabbing, and secondly the main impacts on the environment.

THE MAIN ISSUE OF RESPECT FOR THE RIGHTS OF LOCAL COMMUNITIES

Mining, gas and oil extraction projects have serious consequences for the local economies and populations. The arrival of a project of a certain scale is systematically associated with more or less severe impacts on land occupation, health and certain pre-existing economic activities (farming, fishery, tourism, etc.).

Given the severity – and in some cases irreversibility – of these impacts, the first right to respect is that of Free, Prior and Informed Consent (FPIC), and in a more general sense the effective consultation of populations that may potentially be affected. With regard to indigenous populations, FPIC is internationally recognised, notably in the International

Labour Organization Convention 169 and in the United Nations Declaration on the Rights of Indigenous Peoples. As for non-indigenous populations, a large majority of countries in the world have legislation containing obligations in terms of consultation and public participation. This issue concerns even France, as was demonstrated in the

12. <https://www.total.com/sites/default/files/atoms/files/droits-de-l-homme-document-information-actualise.pdf>

recent legal proceedings brought by Friends of the Earth France, Greenpeace France and five other associations against the authorisation for Total to begin very deep drilling works off the coast of Guyana and which was based in particular on the absence of referral to the National Commission for Public Debate¹³.

In its vigilance plan, Orano does not mention at any point the need to obtain public consent or even to consult the populations that may be affected by its activities. On a more general note, it is very worrying that within its plan the company does not even appear to address the risks of impacts linked to its mining activities, when these constitute a core activity for the Group and it operates in countries that are at particular risk, such as Niger and Kazakhstan.

For its part, Total makes no reference to the specific rights of indigenous peoples¹⁴ and only discusses the matter of consulting local populations in the plan's introduction as part of its « *process of dialogue with stakeholders* ». The company explains organising consultation meetings « *to better understand their impacts* » and establishing a network of mediators in touch with local communities « *to maintain a constructive dialogue* ».

Finally, Eramet employs a similar approach to Total, through various « *mechanisms of dialogue* », « *information and consulting activities with the residents* », « *in order to take into account their impacts* ». Eramet does, nevertheless, appear to go a step further with taking into account the level of impact and risk of each site and a « *reinforced vigilance regarding indige-*

nous or vulnerable populations », but neither explains what this reinforced vigilance actually contains nor mentions the FPIC.

What appears evident is that opposition to an extraction project from local communities is often considered by companies to be a simple problem of poor communication that could be resolved by building « *a relationship of trust* ». In the meetings organised by the companies, the projects are often presented in a biased and partial manner, emphasising the possible future benefits for the local populations and downplaying the risks. Above all, they are never about obtaining the consent of the resident populations, and even when affected individuals

Opposition to an extraction project from local communities is often considered by companies to be a simple problem of poor communication

voice criticism or complaints, they are generally left unanswered or rarely lead to substantial modifications to the project.

This issue of population consent is all the more worrying in cases where the project requires massive land grabbing which too often results in pressure and intimidation, forced evictions and/or insufficient and inadequate compensation. On this subject, Total briefly

mentions in its risk mapping « *the restriction of access to land inhabited by local communities* », but without then presenting any action to address this risk.

Of the three companies, Eramet is the only one to more explicitly touch on the risks of human rights abuse related to land acquisition, and refers in its vigilance plan to the Performance Standards of the International Finance Corporation (World Bank Group). Nonetheless, in 2013, an alarming report – based on fieldwork – exposed forced evictions and violation of the right to FPIC of indigenous communities affected by Eramet's exploration project « *Weda Bay* » in Indonesia¹⁵.

In many countries, the extractive sector is also linked to very serious violations of fundamental rights and freedoms of individuals: repression, intimidation and even assassinations increase each year. In its plan, Total mentions the « *disproportionate use of force* », but only in its risk mapping. On this subject, the responses are essentially the same as in the other sectors, and the role of the whistleblowing mechanism is therefore key, as explained in our analysis of the agri-food industry. In addition to the companies' internal whistleblowing mechanisms, Eramet and Total indicate in their plans that they have systems dedicated to resident populations with, in the case of Eramet, « *methods for reception, treatment and resolution which are adapted to the body's cultural context and the nature of the impact* ». In both cases the actual methods of these whistleblowing systems are not detailed. Orano only mentions one internal whistleblowing mechanism.

13. See the press release from Amis de la Terre France and other petitioning associations, 12 December 2018: <https://www.amisdelaterre.org/Forages-petroliers-en-Guyane-face-au-deni-de-democratie-la-societe-civile.html>

14. The risk of violations of the rights of indigenous peoples are addressed in Total's « *Human Rights* » report, which mentions the FPIC and indicates that the Group has a « *Charter on the rights of indigenous peoples* ».

15. Marshall, Shelley D. and Balaton-Chrimes, Samantha and Pidani, Omar, Access to Justice for Communities Affected by the PT Weda Bay Nickel Mine – Interim Report (September 4, 2013): https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2343957. The authors of the report explain that « *community members who will lose access to their land that they cultivate were subjected to pressure and intimidations to sign agreements with the company* ». This situation had already been revealed by the Indonesian National Human Rights Commission (Komnas HAM) (findings and recommendations on page 47).

ENVIRONMENTAL AND HEALTH-RELATED IMPACTS

The large scale nature of mining, gas and oil projects comes with environmental and health-related impacts that appear to sometimes be difficult to manage, despite the technical advances made in terms of managing these risks. Indeed, whether it is hydrocarbons or mineral ores, exploration has become more and more complicated: the resources (metal, oil, gas, coal) are no longer found in concentrated form, they are dispersed in the rocks or sand that contain them. Consequently, extraction techniques have become increasingly invasive and destructive: giant open-pit mines, mountaintop removal, tarsands, shale gas and oil, etc.

This results in major contamination of the air, water and ground which then has severe health-related consequences (respiratory and skin diseases, cancers, etc.), as well as often destroying or polluting resources on which the resident populations depend to live (forests, rivers, fertile soils, etc.). Extraction activities also imply high levels of water and energy consumption and greenhouse gas emissions, thus contributing to global warming. Lastly, serious accidents continue to occur as demonstrated by the Deepwater Horizon catastrophe,

the permanent oil spill in Nigeria's Niger Delta or, more recently, the Mariana mining dam collapse in Brazil.

As previously mentioned, in its vigilance plan Orano does not consider the risks linked to its mining activities, with the exception of one sentence in the section concerning its subcontractors where it indicates that a monitoring of the subcontractors using dosimetry is ensured by its subsidiaries. So there is nothing on the pollution risks linked to the extraction of uranium, despite its enormous impacts¹⁶ and the fact that its radioactive contamination continues for many decades after, as shown by the long record of mining left in France by Cogema (now Orano) in the region of Limousin for example¹⁷.

As for Total, the issue of greenhouse gas emissions and global warming is completely absent in its vigilance plan¹⁸ and neither does the company mention the risks of air, water and ground pollution. The word « *pollution* » only appears once regarding the risk of largescale, accidental pollution, and therefore does not take into account the risks of pollution from carrying out « *normal* » operations (for example pollution linked to burning gas, which is far from being the only

one). The same goes for the risks of water pollution and overuse; Total touches on the issue of populations having access to potable water, but yet again does not suggest any solution for this in the measures implemented.

Eramet is the only company of the three to provide details on the actions that it has put in place to manage the environmental risks. This is a positive element in terms of the plan's form, but we find large gaps in the content. To give a few examples, we do not understand why the issue of water pollution is only addressed for Eramet's industrial sites, but not for its mining sites. Mining sites can cause the contamination of surface water and groundwater¹⁹, in particular from rainwater runoff from heaps of mining tailings or even from mining tailings that are directly discarded in streams. The company does not mention the dust emissions from open-pit mines and transport in dumpers either, when these have consequences for the health of workers and local communities and can also cause environmental problems depending on the composition of these dust emissions.

16. See in particular the report by Greenpeace: Left in the dust AREVA's radioactive legacy in the deser towns of Niger (2010): <https://www.greenpeace.org/archive-international/Global/international/publications/nuclear/2010/LeftinthedustF.pdf>, and the 2013 l'Observatoire des multinationales articles: « Areva deaf to civil society's demands » <http://multinationales.org/Niger-Areva-sourde-aux-demandes-de> ; « The impact of uranium mines »: <http://multinationales.org/Impact-des-mines-d-uranium-Areva> ; and finally the testimony of the Niger association Aghir In'man in 2017 https://www.francetvinfo.fr/sante/environnement-et-sante/exploitation-de-l-uranium-au-niger-nous-avons-herite-de-la-pollution-durable_2378413.html

17. See the follow-up by the French Institut de Radioprotection et Sûreté Nucléaire (IRSN), notably on old uranium mining sites in France: https://www.irsn.fr/FR/connaissances/Environnement/expertises-locales/sites-miniers-uranium/Pages/1-exploitation_uranium_en_France.aspx?dld=dc655106-968f-4948-b6f7-01c78d23229c&dwld=od36bacd-9bfa-44aa-8de9-93e4811629b0#.XEJNSqd7Q8Y ; and on the health of former Cogema employees, revealing abnormally high levels of lung and kidney cancer: <https://www.irsn.fr/fr/larecherche/organisation/equipes/radioprotection-homme/lepid/pages/lepid-cohorte-mineurs-uranium.aspx#.XEJMIqd7Q8Y>.

18. Total was the subject of an appeal on this matter brought by a group of associations (Notre Affaire à Tous, Les Eco Maires, Sherpa and ZEA) and 13 municipalities in October 2018: <https://www.asso-sherpa.org/15c-13-collectivites-4-associations-interpellent-total-face-changement-climatique>

19. Residents of Moanda in Gabon complained about water contamination linked to manganese exploration by Comilog, a subsidiary of Eramet: http://www1.rfi.fr/actufr/articles/103/article_68220.asp

ARMS SECTOR



PLANS REVIEWED:

Thales:
https://www.thalesgroup.com/sites/default/files/database/document/2018-05/document_de_reference_2017_1.pdf

Naval Group:
<https://www.naval-group.com/wp-content/uploads/2017/03/dcns-rapport-dactivite-2016-fr.pdf>

Dassault Aviation:
https://www.dassault-aviation.com/wp-content/blogs.dir/2/files/2018/03/Dassault_Aviation_2017_RFA_FR.pdf

INTRODUCTION

These last years, France has become the world's third biggest arms exporter. In 2015, orders reached a record level of 17 billion Euros²⁰.

France has ratified the Arms Trade Treaty (ATT) which entered into force on December 24 2014. The ATT imposes, for the first time, restrictions aimed at ensuring that states do not transfer arms, ammunition, parts and components whenever there is a risk that they might be used to commit or facilitate acts of genocide, crimes against humanity or war crimes (article 6).

Even if a transfer is not banned, the ratifying States must assess if there is a « *substantial* » or « *major* » risk that arms exports might contribute to serious violations of international humanitarian rights and related human rights before

authorising them. This international treaty complements the EU Council Common Position 2008/944/CFSP of 8 December 2008, which defines

In France it is forbidden to export war materials

common rules governing the control of exports of military technology and equipment. The latter also covers technical assistance, including trai-

ning and maintenance in operational condition. Besides, arms manufacturers are obliged to respect international arm embargoes, as well as treaties banning certain arms (antipersonnel mines and cluster bombs), according to the Ottawa and Oslo conventions. In France it is forbidden to export war materials. Those exports are only possible after being authorised by the Prime Minister following an interministerial evaluation process.

However, states show an astonishing lack of political will in the matter, notably regarding the ATT dispositions. The fact that France and other countries have refused to suspend arms transfers towards Saudi Arabia, despite the countless suspected war crimes committed by the Saudi-led coalition in Yemen, has become an emblematic case of irresponsible, even illicit arms trade.

20. 2018 Parliamentary Report on arms exports, <https://www.defense.gouv.fr/actualites/articles/rapport-au-parlement-2018-sur-les-exportations-d-armement>, p.73



GENERAL ANALYSIS OF THE PLANS

Thales, Naval Group and Dassault Aviation's vigilance plans in particular have been reviewed for this sector overview and were examined in the light of the criteria developed in the first part of this review. These three corporations are among the world's top 100 arms-producing and military services companies for 2017 according to the SIPRI fact sheet published in December 2018: Thales ranks 8th, Naval Group 19th and Dassault 50th²¹. The French state holds a 62.5 % stake in Naval Group.

Besides furnishing a wide variety of war materials (optronics, avionics...), Thales and their subsidiaries also provide ammunitions (TDA Armements SAS in France and Forges de Zeebrugge in Belgium) as well as dual usage goods subject to a European Union regulation to which the Common Position 2008/944/PESC mentioned above applies. Another feature of Thales, regarding the defence solutions offered by the company, is that they are usually integrated to or associated with the arms systems proposed by Naval Group or Dassault. Naval Group are known suppliers of warships (frigates, corvettes, submarines, LHD...) and Dassault supply combat aircraft (Rafale, Mirage). All these companies also provide technical assistance, including training and maintenance in operational condition. So Dassault warrants, for instance, the maintenance of the United Arab Emirates fleet of Mirage 2000-9; similarly, Naval war-

rants the maintenance of the combat ships sold to Egypt. In December 2018 Naval announced they were opening a new subsidiary in Egypt, Alexandria Naval for Maintenance and Industry (ANMI), to manage current maintenance contracts²².

These three companies' vigilance plans are, indeed, accessible, but they remain relatively hard to read. They refer to other reports of the company, which makes for difficult reading. Particularly in the case of Thales, the plan keeps redirecting to other company documents, which means one needs to spend time researching in order to get the full information. This absence of readability goes against the actual purpose of the law.

With regard to the means implemented, all three companies reviewed insist they have implemented internal and external controls which are useful means of exercising vigilance, but without ever giving any precisions about their contents.

All these companies indicate that they have a monitoring system in place, but without giving any other details, either of schedule, means (human, financial, material) or indicators (qualitative and quantitative).

None of the corporations reviewed report in their vigilance plan a list of the companies they control, or the countries where they are established or

operate, or the number of employees and activities, and they do not indicate which risks are associated to these locations and activities. Naval Group and Dassault Aviation do not mention any specific risk. They just list the main components of their vigilance plans without going into details.

In the case of Naval Group and Dassault Aviation, the plans themselves do not contain a methodology for the analysis, evaluation and prioritisation of risks that takes into account the risks for the population or the environment; whenever methodologies are mentioned (usually somewhere else in the annual report) they deal with risks for the investors or, at best, for the companies themselves.

The sections about whistleblowing mechanisms are quite poor. Certain companies (Naval Group and Thales for instance) specify that the mechanism which covers corruption is also used to cover the duty of vigilance, but without giving any further details. As for Dassault Aviation, they indicate that this mechanism will become operational in 2018.

None of them indicate the mitigation and compensation measures regarding the risks to third parties and the environment.

21. https://www.sipri.org/sites/default/files/2018-12/fs_arms_industry_2017_o.pdf, p.9

22. See <https://www.naval-group.com/en/news/naval-group-strengthens-its-partnership-with-the-egyptian-navy-for-the-next-five-years/>

ANALYSIS OF THE PLANS IN TERMS OF THE CHALLENGES OF THE SECTOR

In their vigilance plans, French arms manufacturers tend to downplay the risks linked to human rights or not even mention them. The main problem, as in other sectors, is that companies under review dwell on risks they themselves come under rather than those that their activities might pose for people and the environment with serious consequences.

Now, although arms trade is a legitimate and legal activity, the arms transfers it facilitates fall within strong judicial boundaries. In particular, the transfer of equipment, technology, personnel or training in the fields of the military, security or police, as well as logistic or financial support for these transfers can contribute to grave violations of human rights and international humanitarian rights. The following are violations often documented by Amnesty International and their partners:

- Violations of the right to life, notably summary and extrajudicial murders and executions;
- Disproportionate and indiscriminate attacks such as deliberate armed attacks on medical installations and personnel, teaching establishments and their pupils and camps of refugees or people displaced within their own countries;
- Forced displacements of populations;
- War crimes;
- Forced disappearances.

Even quite recently, Amnesty International pointed out that French war and security material had been given to Egyptian Interior ministry forces or handed over to them and then used against Egyptian demonstrators, for example, despite France's international

commitments²³. Previously, Amnesty International and Actions by Christians for the Abolition of Torture (ACAT) published a report²⁴ which they had commissioned to Ancile law firm, which they had commissioned, looking at the legality of French arms transfers to Saudi Arabia and the United Arab Emirates, two of the main actors in the war in Yemen. The report concluded that there was « *a high judicial risk that the arms transfer could be illegal with regard to France's international commitments, whether it be the rulings of the Arms Trade treaty or the Common Position* ».

Regarding Thales, one must turn to the « *legal and compliance risks* » section to know more about export controls and economic sanctions and what that means for the company, but there are no details on how the operation was carried out. The fact that this section is not included in the vigilance plan is a problem given the serious human rights issues involved. It is only on its website, elsewhere than in the vigilance plan therefore, that the company says it respects existing exports rights²⁵.

More specifically, there are also issues linked to working conditions at the equipment construction sites of the subcontractors and suppliers of French industrialists.

By way of example, Front Line Defenders in January 2019 published a report on Naval Group and the manner in which 26 workers at a site called Alexandria Shipyard, held and managed by the Egyptian army, were arrested and put before a military court – without charges being made – following a strike in May 2016 when

they demanded a minimum salary, security conditions and bonuses. The sites involved are building, as part of a transfer of technology, three Gowind-2500 corvettes. This transfer is the result of a contract made in 2014 between Egypt's Defence ministry and Naval Group for the sale of four corvettes, only one of which is being made in France. Front Line Defenders' report echoes the findings of Amnesty International²⁶, who had challenged the company²⁷.

In Egypt, workers' rights defenders have been victims of persecution – intimidation, sackings, enforced disappearances, torture and military trials – since Marshal Abdel Fatah al-Sissi took power. More than 15,000 civilians have been sent to military courts. Such risks ought therefore to be mentioned in the vigilance plan of Naval Group which has, furthermore, just opened a branch [in Egypt].

In light of these findings, Thales is the firm that gives the most details of the issues and risks in its supply chain, such as working conditions, the environment and the use of toxic substances or even « *conflict minerals* ».

And it provides solutions to put in place as a response to these challenges: chromate replacement, identification of suppliers at risk of conflict minerals – but we lack the means to evaluate how effective these are. Corruption is quite far reaching even if it does not come under the aegis of the law on duty of vigilance (but rather the law relating to transparency, the fight against corruption and modernising economic life, known as Sapin II).

23. Amnesty International, Egypt: French weapons at the heart of repression, 2018, <https://www.amnesty.fr/controle-des-armes/actualites/france-egypte-aux-armes-policiers-egyptiens>

24. https://www.acatfrance.fr/public/etude-juridique_cabinet-ancile_transfert-d-armes-de-la-france-dans-le-cadre-du-conflit-au-yemen.pdf

25. <https://www.thalesgroup.com/fr/worldwide/groupe/des-exportations-sous-contrôle>

26. See <https://www.amnesty.org/fr/latest/news/2017/04/egypt-relentless-assault-on-rights-of-workers-and-trade-unionists/>

<https://www.amnesty.org/download/Documents/MDE1261542017ENGLISH.PDF>

<https://www.amnesty.fr/responsabilite-des-entreprises/actualites/egypte-des-travailleurs-et-des-syndicalistes-reprimés>

27. Correspondence in May and June 2017 between the company D.C.N.S and Amnesty International. Furthermore, Amnesty International met with the company in August 2017.

Regarding their actions taken in favour of human rights and fundamental freedoms, Thales mentions that they adhere to the UN Global Compact, something the Naval Group has also mentioned. However, the Global compact is not a binding instrument, but an incentive for the signatory companies to show initiatives reflecting their voluntary commitment to integrate these principles into their strategies and activities. Its effectiveness is quite relative and above all unverifiable.

Thales specifies as well that they apply the OECD guidelines for multinational enterprises. At this point, the company also indicates that they have supported the United Nations Arms Trade Treaty, which came into force at the end of 2014, and that they have ceased all activity in the field of cluster munitions in line with the Oslo Convention. The company also referred to the UN Guiding Principles on Business and Human Rights.

Starting next year and thereafter, all arms manufacturers subject to the law on duty of vigilance should more detail the risks related to their activities which could impact the human rights of third parties and the environment, giving the exact location and activities of their subsidiaries, subcontractors and suppliers in terms of these risks.

It is time for companies to implement a paradigm shift and understand the law does not require them to analyse the risks to themselves but rather to human rights.

Because it is striking to observe that

issues of compliance with human rights international law relating to the use of arms supplied are generally not taken into account, in association with the applicable international law which France, as well as its companies, must respect.

To do that, the company can raise questions that are specific to the arms sector and which should guide their actions and their vigilance measures. A few examples, without being exhaustive:

- Which mechanisms have been implemented to make sure the company respects international sanctions set out by the European Union and the United Nations such as arms embargoes? Arms embargoes are usually wide reaching.
- Which internal mechanisms have been implemented to check the recipient's actions in terms of arms embargo?
- Which internal mechanisms have been implemented to respect the national regulations in terms of arms export control, including the Arms Trade Treaty and the EU common position?
- Which internal mechanisms have been implemented in order to exercise vigilance regarding decisions resulting in a request for an export licence submitted to the Ministry of the Armed Forces in relation to the respect of the human rights international law by the recipient state? But also what analysis has been made regarding the nature of

the arms, the risk of gross violations of international law in terms of the end user and the declared end use?

- Which internal mechanisms have been implemented to respect export control regulations in the country where the subsidiaries are located and the destination of the equipment ?
- Which internal mechanisms have been implemented to avoid the risk of diversion whenever there are intermediaries in the transfer chain (broker, financing, transport)?

AGRI-FOOD

SECTOR



PLANS REVIEWED:

Bel:
<https://www.groupe-bel.com/wp-content/uploads/2017/03/bel-ddr-2017.pdf>

Bolloré:
https://www.bollore.com/bollo-content/uploads/2018/06/boll_1802391_rapport_d_activite_fr_mel.pdf

Danone:
https://www.danone.com/content/dam/danone-corp/publications/publicationsfr/2018%2004%2012%20Danone-Documents_de_Reference_2017.pdf

INTRODUCTION

The agri-food industry is the primary French industrial sector, worth 180 billion euros in 2017²⁸. France is the second biggest agri-food exporter in Europe and fourth in the world, with 44.2 billion euros worth of exports in 2016²⁹. Moreover, agri-food is the primary sector of industrial investment in France. With this in perspective, it

is worth checking that the agri-food giants are exercising their duty of vigilance in a transparent, exhaustive and sincere manner in order to identify, prevent and remedy any adverse impacts on human rights, the environment or common goods resulting from their activities.



GENERAL ANALYSIS OF THE PLANS

Considering the size of the three companies selected, Bel, Bolloré and Danone, and their value chains in France and internationally, their vigilance plans are shockingly short and, consequently, vague. In general, the plans in fact take very little of the specificities of their activity sector into account.

First of all, regarding the consultation with stakeholders, their identification and the risk mapping is not at all specific to these three

companies' activities and diverse locations. Bolloré carried out a more detailed risk mapping than the other two companies reviewed by defining a principal geographical area, but the reasons for such as choice are hardly documented and the company recognised that the dialogue with the stakeholders concerned in these areas has not yet been organised at all levels of the company.

But above all, when reading the vigilance plans of Bel, Bolloré and Danone, it appears that their risk mapping is evasive and does not target specific risks. Only Bolloré mentions specific cases of activity sites in its risk mapping. Nevertheless, this pick-and-choose approach makes their methodology questionable. Also, if further research and analysis of the risks has been carried out, it is unfortunate that these three companies have not, in an effort to be transparent, published it for the stakeholders to see. Furthermore, companies tend to mix up the information linked to duty of vigilance

with their CSR efforts or non-financial reporting, which does not at all facilitate understanding the plans

In light of this, CCFD-Terre Solidaire has written a report called *Vigilance on the menu*³⁰ in which there is a detailed analysis of five symptomatic risks of the agri-food industry which, at the moment, are not sufficiently addressed by the companies in the vigilance plans that have been examined. Without providing the entire report, which has been published in March 2019, we can list the non-exhaustive risks and briefly explain the issues linked to them:

It appears that their risk mapping is evasive

● Risk of resource grabbing: land and water.

Land and water grabbing, whether legal or not, of a territory can bring negative impacts for local communities and affect the economic, social, societal or environmental balance of these people by violating their rights.

● Risk of violation of the rights of farmers: contracting.

Contracting is an agreement between a farm owner and a company which defines conditions of production of a given product on the land of the farmer and conferring certain rights of ownership of the harvest to the company. The power relationship between the farmers and the contracting companies can be asymmetric and lead to unfair contracts which endanger human rights.

● Risk of impact on biodiversity: seeds.

In a context where cultivated and wild species are disappearing, where diseases and natural disasters are increasing, it is essential for compa-

nies that are active in the sector of seeds to be transparent on the policies regarding research, marketing of seeds and protection of biodiversity.

● Risk of impact on the environment and health: pesticides.

It is undoubtedly essential that companies are vigilant on all measures of traceability, transparency and security concerning the production, marketing, use and reduction of pesticides in order to avoid any health or environmental risks.

● Risk of criminalisation: human rights defenders.

There is a conflict between the exploitation of natural resources on the one hand and on the other hand the efforts of defenders to protect the environment and communities and guarantee that legally mandatory consultations are implemented. Given that the means of the companies and the defenders are totally unequal, it is important that the agri-food companies pay particular attention to the consultation and protection of these individuals.

Having presented these few elements of the CCFD-Terre Solidaire report, we believe it is essential to mention another weak point in the vigilance plans from 2018: the whistleblowing mechanisms.

28. Ania, « *Economic review 2017 of the food industry* », March 2018, available on <https://bit.ly/2RsaawV>

29. Ministry of Agriculture, Agrifood and Forestry, *Panorama of agri-food industries*, Edition 2018, p.10.

30. CCFD-Terre Solidaire, *Vigilance on the menu*, March 2019.

WHISTLEBLOWING MECHANISMS

Beyond inaccurate and incomplete risk mappings, the companies give very little (or even no) details on the whistleblowing mechanisms. These are essential in order for individuals such as human rights defenders and environmentalists to be able to signal risks and violations caused by activities of a company so that the latter, knowingly, can rectify them.

Thanks to their work, the defenders help to identify, prevent, mitigate and allocate responsibility for violations committed by companies. Everywhere in the world, on a daily basis, they might face serious risks to their lives and livelihood since they very often work under threat of extrajudicial execution, deportation, surveillance, incriminations and intimidation resulting from their efforts to defend human rights against commercial interests. Thus, without functional and safe whistleblowing mechanisms, defenders' may see their fundamental rights violated and may face risks as serious as death.

In 2017, the Business and Human Rights Resource Centre recorded 388 attacks against human rights defenders. 100 cases, of which 55 were deaths, were linked to the agri-food industry. Global Witness, for its part, documented the killing of 207 land and environmental defenders in 2017³¹. Almost a quarter of the defenders killed were protesting against agribusiness projects – which is a 100% increase compared to the

data published by this NGO in the previous year – making this sector the deadliest for the first time.

In a sector which is greatly affected by intimidations, forced evictions or deaths, French companies must actively get involved in order to make sure that their subsidiaries, subcontractors or suppliers do not contribute to the perpetuation of these repressive practices by putting in place efficient whistleblowing mechanisms. The UN Guiding Principles are clear on what is expected of these mechanisms: « *to make it possible for grievances to be addressed early and*

remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted »³².

The whistleblowing mechanisms are in fact essential so that com-

panies can anticipate and manage as close as possible to local realities the risks of adverse impacts on freedoms and fundamental democratic principles. The UN Special Rapporteur on the situation of human rights defenders, Michel Forst, notes that « *for defending human rights over profit, privilege and prejudice, ordinary people, communities, workers and trade unionists face stigmatization, criminalization, physical attacks and sometimes death. In many situations, such brave people are being deprived of their most fundamental rights for the mere fact of having opposed*

powerful interests »³³. It is therefore the democratic ideal and, above all, fundamental liberties that are being harmed when individuals expressing their opinions to protect the environment, guarantee acceptable working conditions, fight against corruption and defend the rights of affected communities are threatened, intimidated and silenced.

Yet, although it is a duty in the law, it must be noted that the vigilance plans only make succinct references to these whistleblowing mechanisms – when this issue is merely mentioned.

The companies Bel, Danone and Bolloré, for example, all mention whistleblowing mechanisms at different stages of rollout. Bolloré mentions a « *management of reports concerning behaviours that do not comply with the specified vigilance measures* » which will be implemented over the course of the year³⁴, without further details being added. Bel refers to a mechanism with regard to distributors which allows them to be « *informed if any of its distributors, customers or agents, of which there are nearly 500, is convicted, politically exposed or added to an embargo blacklist* »³⁵. Lastly, Danone mentions a whistleblowing and reporting mechanism which *a priori* is more complete with « *a whistleblowing system whereby employees, suppliers and other third parties may confidentially report any suspicions of fraud, corruption [...] violations of Human Rights and environmental rules violation* »³⁶.

Nevertheless, there are many ques-

31. Global Witness, *At what cost?*, 2018, p.9.

32. United Nations, *United Nations' Guiding Principles on Business and Human Rights*, 2011, principle n°29.

33. Forst, *Situation of human rights defenders*, A/72/170, 2017, para.3.

34. Bolloré, *Activity Report 2017, 2018*, p.112.

tions regarding the description of these mechanisms. Were they designed in consultation with the trade unions, as required by law? Bel and Bolloré do not give any details, and Danone mentions a mechanism designed « *in consultation with staff representative bodies* ». But have these mechanisms been advertised outside of the company? While Danone explicitly mentions a mechanism which is accessible for external stakeholders, Bel and Bolloré, on the contrary, draw from corruption whistleblowing mechanisms and appear to limit the mechanism and its publicity to company staff – in this regard Bel alludes to an internal training programme « *through a film (translated into 20 languages and widely disseminated) and posters dedicated to the whistleblowing system in all Group subsidiaries* »³⁷ – and to corruption and business ethics issues (in accordance with the Sapin II law on anti-corruption). Escalating the information and accessing the whistleblowing mechanism for violations that take place in suppliers, subcontractors or the local communities therefore still remains a major challenge...

Many questions regarding the governance of these mechanisms accompany this crucial challenge. Bel and Bolloré say nothing about how they are operated: do headquarters manage it? And in the presence of staff representative bodies? What relationships are established with staff representatives in concerned countries? Is there a delegation for external bodies? How independent from the directors of the company is this body? How much weight does the whistleblowing mechanism carry in cases where professional misconduct

is found or if after examination of a case it is concluded that it is necessary to withdraw from the market and site and/or break a major commercial contract? Danone provides more detail on the governance: « *all reported wrongdoings will be examined by a steering committee comprising representatives of the Sustainable Development, Human Resources and General Secretary functions* »³⁸. Nonetheless, the questions regarding the independence, accountability or effectiveness of this committee and the coherence of its decisions remain unanswered.

As underlined by the Special Rapporteur on the situation of human rights defenders, Michel Forst, human rights defenders « *help to bring to the attention of States and business enterprises business-related impacts on human rights, address inconsistencies in the domestic legal and policy frameworks that may contribute to such impacts and support affected communities and individuals in seeking remedy where adverse human rights impacts have occurred* »³⁹. For this reason, they are not only pillars upholding democratic balance, but also whistleblowers, quickly detecting where

there are violations of human rights, fundamental freedoms, the environment and/or health.

A whistleblowing mechanism that does not ensure that these individuals could have a sympathetic ear whilst also effectively addressing the problems raised, cannot claim to meet the requirements of the law.

Yet, none of the plans evaluated include measures for eliminating the risk of reprisals against whistleblowers and defenders or measures to protect them.

It is in this sense that in the agri-food sector, where fragmentation of value chains means that communication between the headquarters and its direct and indirect activity zones is essential, whistleblowing mechanisms are a vital prerequisite, both literally and figuratively.

35. Bel, Annual Report 2017, 2018, p.44-45.
36. Danone, Annual Report 2017, 2018, p.170.
37. BBel, Annual Report 2017, 2018, p.41..
38. Danone, Annual Report 2017, 2018, p.184.39.
Forst, Forst, *Situation of human rights defenders*, A/72/170, 2017, para.14.



BANKING SECTOR



PLANS REVIEWED:

BNP Paribas:

https://invest.bnpparibas.com/sites/default/files/documents/ddr2017_fr_bnp-paribas.pdf

Natixis:

https://www.natixis.com/natixis/upload/docs/application/pdf/2018-05/natixis_rapport_rse_-_extraction_ddr.pdf

Société générale:

<https://www.societegenerale.com/sites/default/files/documents/Document%20de%20r%C3%A9f%C3%A9rence/2018/ddr-2018-societe-generale-depot-amf-d18-0112-fr.pdf#page=265>

INTRODUCTION

In terms of legal structure, the large French private banks are limited companies and, with a employees over 5,000, are therefore subject to the new law on duty of vigilance.

Concerning severe impacts on human rights and the environment, the banking activities that pose the greatest risk are corporate and investment banking and asset management. We have therefore concentrated on these activities in this analysis, even if all of activities must be covered in their vigilance plans (be it concerning risks of violations to the rights of their

employees or their private clients, for example). We have studied the vigilance plans of BNP Paribas, Société générale and Natixis.

It is important to underline that Crédit agricole, the second largest French bank and the tenth largest in the world, did not publish its vigilance plan in 2018, as was required by law. Amis de la Terre France contacted the bank which appears to have misinterpreted the law, understanding that it was only necessary to publish its plan as of 2019. Crédit agricole seems therefore confused the vigilance plan

with the implementation report, the latter of which only needs to be published from 2019 onwards. Or, knowing that any potential legal sanctions only come into effect as of 2019, it could be a new example of the fact that without the threat of sanctions, companies are unwilling to act.

**Crédit Agricole,
the second largest
French bank and
the tenth largest in
the world, did not
publish its vigilance
plan**

GENERAL ANALYSIS OF THE PLANS

As with most companies, the general analysis of the plans reviewed highlights that their content is too vague and they lack detailed information on concrete measures and actions and on the planned monitoring systems for evaluating their implementation and effectiveness.

Regarding the risk mapping, the banks appear to have understood its importance in actions for vigilance. They provide some facts on their methodology. The three banks worked jointly to initiate this risk mapping⁴⁰. Each of the banks identifies general challenges linked to respecting human rights and

the environment. But the results of this risk mapping, which constitute the most important information for the stakeholders, principally those who may potentially be impacted, are not published as they should be: the plan should explicitly contain the list of countries at risk and the detailed risks for each type of activity or project contained in the banks' portfolio.

Regarding the whistleblowing mechanism, none of the three banks foresee one that is available for third parties (local communities, etc.). We also deplore the lack of clarity on the treatment of these reports –

who treats them, how. In contrast, Natixis explicitly notes that there will be no disciplinary or legal action against whistleblowers. It is important to highlight that a protection mechanism for whistleblowers is provided for in the Sapin II law. Moreover, there should be no reprisals or legal action taken against individuals who transmit the information (via the whistleblowing and report collection mechanism), even if they are not considered whistleblowers.

HOW TO APPLY THE LAW ON DUTY OF VIGILANCE TO THE BANKING SECTOR

There are many elements that allow us to clarify this. Firstly, under pressure from public campaigns, notably those of Friends of the Earth France since 2005, banks developed a number of voluntary codes of conduct to take into account environmental and social risks and respect for human rights in their corporate and investment banking activities. These voluntary commitments and the measures the banks put in place to respect them provide a basis for the vigilance plans to be elaborated.

THE ROLE OF SECTORAL POLICIES AND OTHER VOLUNTARY COMMITMENTS

Firstly, the banks have elaborated in-house « *sectoral policies* » in order to regulate their activities in at-risk sectors such as extraction, fossil fuels, arms, or even palm oil.

Secondly, collectively on an international level, the banks have contributed since 2003 to the creation and development of the « *Equator Principles* ». These are ten principles committing the banks involved to take into account a certain number of social and environmental criteria before any project

finance advisory activity or before any decision to finance a major project or grant loans to a company⁴¹. In the Equator Principles there are also some of the elements that must be included in the vigilance plans regarding risk identification or implementation of a whistleblowing mechanism, for example. Equator Principles Financial Institutions (EPFIs) must refuse to finance or grant loans to companies linked to any project which cannot prove that it complies with the principles.

As for project finance advisory services, the EPFI demands that the client « *explicitly expresses their intention to meet the Equator Principles* ».

The three banks reviewed mention their sectoral policies and the Equator Principles in their vigilance plans. This is very important as the banks' policies and voluntary engagements thereby become binding due to the fact that the banks' civil liability may be incurred on the basis of their vigilance plans.

However, it is important to emphasise that the content of these policies remains insufficient. The inadequacy of the Equator Principles was underlined many times. Following the Dakota Access Pipeline scandal in the USA, a project that was supported by ten EPFIs, four of which were French banks, civil society demanded that the standards of evaluation of projects be the same in all countries since issues regarding respect for community rights and the environment can equally arise in Designated Countries⁴². More recently, in a letter to the EPFIs in October 2018⁴³, 45 global civil society organisations insisted on three critical principles:

The content of these policies remains insufficient

- the Equator Principles place no restrictions on the financing of projects or infrastructures related to fossil fuels, and no obligation to ensure that financed projects limit their impact on climate change;

- they have not prevented the financing of projects leading to severe human rights abuses, in particular violations of the right of Indigenous Peoples to Free, Prior and Informed Consent and of the land rights of various communities, including forced evictions;

- they do not always guarantee full transparency or access to project information for the concerned communities.

Lastly and most importantly, it is necessary to point out that the Equator Principles only apply to project finance, which represents less than 10% of the financial services of banks – the main ones being general loans to companies or issuance of shares on the financial market.

The sectoral policies also have many gaps, some even regarding the scope of application, or above all when it comes to criteria for excluding companies of certain sectors such as those of coal or tar sands. For example:

- **Lack of policies on certain high risk activities** such as offshore projects which pose severe danger to the

climate and biodiversity. Between 2015 and 2017, BNP Paribas, Crédit agricole, Société générale and Natixis granted 502 million dollars to Total's deep-sea offshore oil activities⁴⁴.

- **Many policies are much too permissive** such as Société générale's oil and gas policy. Far from taking into account the impacts of liquefied natural gas on the climate, Société générale takes pride in its role as a global leader in this sector, describing it as « *an energy source to transition to a low-carbon world* » and presenting it along with its renewable energy development financing⁴⁵. In December 2018, in response to being targeted by a massive citizen action for its support of Rio Grande to LNG shale gas export terminal project⁴⁶, the bank reaffirmed that « *gas, including shale gas, is a necessary transition energy* »⁴⁷.

- **The policies are too often vague and unclear**, such as BNP Paribas' coal policy which simply requires that the companies it finances have « *a diversification strategy leading to a reduction in the proportion of coal in their electricity production* »⁴⁸. In reality, this policy has not stopped the bank from giving up to 995 million euros in finance, since COP21 and adoption of its coal policy, to the German energy company RWE, despite the latter planning expansions to its mines in Hambach and Garweiler in spite of their huge environmental

and social impact and major public opposition⁴⁹. In fact, as RWE bought out EON's renewable energy portfolio, the proportion of coal in their energy production mix has gone down and so BNP Paribas now considers the company to be in a transition period, despite it not having any intention to review its involvement in the coal sector

- **The policies lack coherence**, such as the oil and gas policies and the coal policies of Natixis and Crédit agricole which exclude the financing of new coal-fired power plant projects, but do not exclude financing the companies that develop them. The same goes for their policies which are ill-adapted to the funding mechanisms of new oil pipelines for transporting oil from tar sands⁵⁰.

40. BNP Paribas, Natixis and Société Générale all mention in their plans the fact that the risk mapping was initiated « *with three other French banks* », without explicitly naming them. We can therefore assume that they did it together and that the last bank involved is Crédit Agricole.

41. https://equator-principles.com/wp-content/uploads/2018/01/equator_principles_french_2013.pdf

42. https://www.banktrack.org/download/letter_from_10_banks_to_epa_secretariat_on_designated_countries_eps/170522_letter_banks_on_designated_countries.pdf

43. https://www.banktrack.org/download/letter_from_banktrack_and_45_organisations_to_equator_principles_association_on_ep4/181011_letter_to_epfis_on_update_process_washington.pdf

44. http://www.amisdelaterre.org/IMG/pdf/note_latotalsdesbanques-francaises_final.pdf

45. <https://www.societegenerale.com/fr/transition-energetique-engagements-climat/financement-transition-energetique> et <https://www.societegenerale.com/fr/content/societe-generale-sengage-en-faveur-du-climat-1>

46. For further information on Societe generale's support of gas and shale gas, and on the Rio Grande LNG project, please see the report by Friends

of the Earth: Société générale, « *plein gaz sur les fossiles* » published in March 2018: <http://www.amisdelaterre.org/IMG/pdf/20180712rapport-societegenerale.pdf>

47. <https://www.societegenerale.com/fr/s-informer-et-nous-suivre/dialogue-et-transparence>

48. https://group.bnpparibas/uploads/file/rse_politique_sectorielle_charbon.pdf

49. See <http://www.amisdelaterre.org/Action-de-masse-a-la-mine-d-Hambach-AXA-et-BNP-Paribas-derriere-le-charbon.html> et <http://www.amisdelaterre.org/BNP-Paribas-ciblee-pour-enliser-l-Europe-dans-le-charbon.html>

50. https://www.natixis.com/natixis/jcms/1paz5_71651/fr/natixis-esr-sector-policy-oil-gas ; https://www.natixis.com/natixis/upload/docs/application/pdf/2016-07/160708_coal_policy_fr.pdf ; <https://www.credit-agricole.com/content/download/122247/2424794/version/8/file/Politique-sectorielle-RSE-Petrole-et-gaz-de-schiste-2018-03.pdf> ; https://www.credit-agricole.com/content/download/122248/2424804/version/2/file/Politique_sectorielle_mines_Juin2015.pdf

WHEN DOES A BANK CONTRIBUTE TO HUMAN RIGHTS ABUSES?

In their annual reports the three banks studied indicated that they « respect », « support » or « draw on » a number of international standards. Among these are the United Nations Guiding Principles on Business and Human Rights. In June 2017, the UN High Commissioner for Human Rights published an interpretive guide on the application of the UN Guiding Principles in the banking sector in order to determine in which cases a bank may cause or contribute to human rights abuses and thus in which cases victims should be compensated.

This guide is a response to the Thun Group of Banks which is an international group of banks, including BNP Paribas, with a very restrictive interpretation of banks' liability and which considers that banks cannot « in general » be considered to have contributed to human rights abuses⁵¹. The UN guide has a clear response⁵², in particular underlining cases where the bank fails to take action

when it recognises that it was aware or should have been aware of risks of adverse impact of infrastructure projects or companies that it finances. In concrete terms, if the bank does not withdraw its financial support or does not address the issue with its client to prevent or mitigate the impact, « it could eventually be seen to be facilitating the continuance of the situation and thus be in a situation of contributing ». Following this, the organisation BankTrack published a series of concrete case studies based on this interpretive guide⁵³.

As the law on duty of vigilance draws in particular from the UN Guiding Principles on Business and Human Rights, this guide could help judges to evaluate and interpret the liability of banks that are subject to this law.



51. See the exchanges between the Thun Group, UN experts and civil society on the subject: <https://www.business-humanrights.org/en/thun-group-of-banks-releases-new-discussion-paper-on-implications-of-un-guiding-principles-for-corporate-investment-banks>

52. -« bank can contribute to an adverse impact through its own activities (actions or omissions)[21] – either directly alongside other entities, or through some outside entity, such as a client. [22] (...) For example, a bank that provides financing to a client for an infrastructure project that entails clear risks of forced displacements may be considered to have facilitated – and thus contributed to – any displacements that occur, if the bank knew or should have known that risks of displacement were present, yet it took no steps to seek to get its client to prevent or mitigate them.» “if bank identifies or is made aware of an ongoing human rights issue that is directly linked to its operations, products or services through a

client relationship, yet over time fails to take reasonable steps to seek to prevent or mitigate the impact—such as bringing up the issue with the client’s leadership or board, persuading other banks to join in raising the issue with the client, making further financing contingent upon correcting the situation, etc.—it could eventually be seen to be facilitating the continuance of the situation and thus be in a situation of ‘contributing’.»

53. https://www.banktrack.org/download/how_banks_contribute_to_human_rights_abuses/180416_how_banks_contribute_human_rights_1.pdf

GARMENT SECTOR



PLANS REVIEWED:

(DISPENSER BRANDS)

Carrefour:

http://www.carrefour.com/sites/default/files/carrefour_-_document_de_reference_2017_o.pdf

Auchan:

https://www.auchan-holding.com/uploads/files/modules/re-sults/1520592102_5aa264e657d73.pdf

Casino:

<https://www.groupe-casino.fr/wp-content/uploads/2018/04/Documents-de-reference-chap-8.pdf>

INTRODUCTION

The clothing industry is typically a labour-intensive industry. Since the 1990s, and in particular since 2005 and the Multifibre Arrangement dismantling which completely liberalised the sector, the pillar on which it was founded – production cost minimisation – increased.

The emergence of «fast fashion» in the 2000s, which borrowed from the generalist mass distribution model and applied it to the clothing industry, ended up pushing a model with considerable social and environmental impacts to its extreme.

By relocating their production to low-wage countries, they have delegated the risk to third countries, and consequently to the economic entities there. It is also currently the second most polluting industry in the world, after oil.

The violations and risks of violations are indeed on labour rights– as protected by the conventions of the International Labour Organization (ILO) and also by the International Covenant on Economic, Social and Cultural Rights (ICESCR) and by the Universal Declaration of Human Rights. Identifying and preventing them should therefore be subject to specific analysis in the vigilance plans of the of the globalized economic actor operating in the clothing industry.

The Rana Plaza collapse in Dhaka on 24 April 2013, in which 1,138 workers were killed and 2,000 were seriously injured, highlighted and concentrated remedial actions on the question of health and safety at work, particularly in Bangladesh. As prominent as this was, this event was just the tip of the iceberg; the most systematic violations are the least spectacular and are directly linked to the intensive production rhythm of this sector: wages

well below the living wage in order to meet the minimisation of production costs and excessive working hours to meet the production needs⁵⁴.

This tragic event demonstrated the urgent need to change the growth model of a sector in which 20 years of soft law and ‘ethical’ commitments were not able to prevent the worst accident in history. It is furthermore doubly emblematic as it established the first scandal and awareness of image risk along with the 1996 ‘Nike affair’ and child work in its subcontractors in Pakistan.

We also deplore that at the time of writing this report, and considering that the Rana Plaza shock accelerated work towards adopting national legislation on duty of vigilance, none of the clothing brands have published a plan of vigilance, including big names like H&M and Zara.

Their purchasing power as leaders in the sector make them vital actors in initiating change in the industry’s production model towards taking into account respect for a minimum

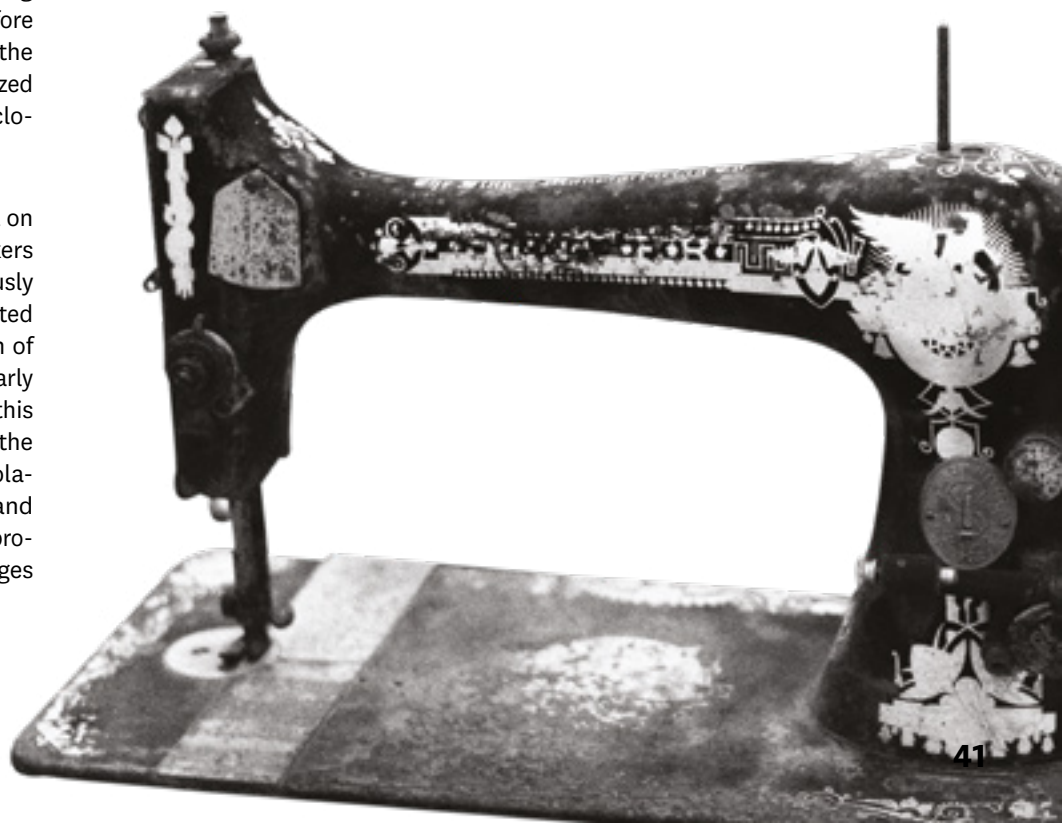
set of fundamental rights at work, and no longer being based on the short-term profitability and competition between workers which generalise violations of international labour standards.

By not publishing a plan, they are not only violating their legal obligation, but also demonstrating their unwillingness, beyond cosmetic measures, to take on their responsibility in developing an industry which they are contributing to dragging down with their model (low-cost production, increasing volumes, and permanently renewing collections as a central paradigm).

Only Decathlon, a brand specialised in sports products, published its vigilance plan, at the time of writing this report, which includes measures aimed at addressing the specific risks in this sector.

Hence, we studied the plans of three main multi-product distributors with their own clothing brands: Carrefour, Auchan and Casino.

54. See the file « Rana Plaza, 5 years later: time for assessment » <https://ethique-sur-etiquette.org/RANA-PLAZA-5-ANS-DEJA>



GENERAL ANALYSIS OF THE PLANS

In general, the three plans are evasive and too generic. They are more of a review of the brands' CSR commitments, which are pre-existing the duty of vigilance. We, and various others, have been pointing out for years that if they are merely declarations of goodwill for consumers, they will fail to prevent serious impacts to fundamental human rights.

While the methodologies for defining a risk mapping appear to be based on relevant criteria for two of the three retailers (Carrefour and Casino), neither of them present the results. They do not specify the degree to which the risk is taken into account in their value chain, nor do they prioritise the risks.

Aside from identifying the risks, the plans remain much too unclear on the measures of prevention and mitigation of violations, which appear to be kept to simple social audits.

None of the companies consider taking on the responsibility as outsourcing company to point out the impact of their business practice on the occurrence of risk. They thus continue to leave the burden of managing the risk to their suppliers and subcontractors, in line with their code of ethics and conduct.

The exercise [of elaborating the plan] is much too succinct and does not specifically address the sectors' challenges enough to be considered efficient, even if it now shows some recognition from Casino and Carrefour of their responsibility when it comes to their supply chain.



The three plans are evasive and too generic

The three retailers do, nevertheless, mention the Accord on Fire and Building Safety in Bangladesh which was signed following the Rana Plaza collapse and which constitutes, for Collectif Éthique sur l'étiquette, an effective measure of prevention and mitigation of risks to the safety of workers in this country.

Carrefour appears to have adopted an interesting risk mapping methodology, crossing various approaches and types of risks, but its mitigation actions amount to communicating a list of its CSR commitments. As the number one French retailer, it is quite significant and unfortunate that in its risk analysis, Carrefour places risks for the company and risks for the stakeholders on the same level: « *business, financial, legal, human/social, image* ». Carrefour must move past interpreting responsibility and duty of vigilance as means of justification for stakeholders so that it can finally translate them into its strategic decisions.

Likewise, Casino presents an interesting approach by introducing a differentiation of risks by sector. Its plan, however, contained almost no measures for mitigation and preven-

tion of violations, even for the garment sector which is identified as being at particular risk, and essentially communicates a series of pre-existing commitments to CSR.

Auchan, which published an extremely succinct two-pages plan, appears to have merely carried out a pure exercise of form which does not show any recognition of its responsibility as outsourcing company, despite the fact that clothes from its own brand, « *In Extenso* », was found in the rubble of Rana Plaza and the company is the subject of a complaint from Collectif Éthique sur l'étiquette, Sherpa and ActionAid France⁵⁵ for deceptive marketing practices.

55. See: <https://ethique-sur-etiquette.org/Plainte-Auchan-Les-associations-se>

INTERESTING RISK ANALYSES, BUT NOTHING SAID ABOUT FUNDAMENTAL AND GENERALISED VIOLATIONS SUCH AS POVERTY WAGES

Casino has in a fairly meaningful way identified several sectors which are particularly « *at risk* »; garment being one of them, along with palm oil and fishery.

Among the risks of violations that the retailers have identified as being a priority, those of health and safety, child labour and non-discrimination figure prominently, and are heavily linked to reputational risk, as seen in continual, publicised disaster. Yet, in the garment sector, large-scale and generalised violations remain less spectacular, closely related to the business model: poverty wages and excessive working hours, the later caused by wages being too low and also as a direct consequence of the pressure on production costs and rates⁵⁶.

Casino and Auchan refer to respecting legal minimum wage, which means only respecting the local law and cannot be considered as a vigilance measure.

Only Carrefour mentions « *decent salaries* » in its supplier charter, but does not specify the measures it plans to take to help ensure them.

Lastly, violation of workers' freedom of association and right of collective bargaining is a key risk, particularly in countries where there is substantial complicity between employer representatives and the public authorities, like in Bangladesh. Yet, these types of violation, which are widespread in countries where this sector has a strategic character, are completely absent from the plans.

If we do not ignore the primary duty of states in the protection of these particular fundamental rights, we believe that no company can presume to guarantee its duty of vigilance without identifying the ways in which its model allows, encourages or profits from situations of social dumping in the countries where it operates.



56. See the report from Collectif Éthique sur l'étiquette « *Salaires sur mesure* »: <https://ethique-sur-etiquette.org/Rapport-Salaires-sur-mesure>

PREVENTION MEASURES WHICH ARE LIMITED TO SOCIAL AUDITS AND IGNORE PURCHASING PRACTICES

In terms of risk mitigation, the measures described in the plans are generally limited to conducting social audits or to other similar control measures described at length, or even sometimes to training staff.

It has, however, been established for more than a decade that social audits are necessary, but far from enough to prevent violations⁵⁷. Firstly, they must be carried out following an ambitious methodology and frame of reference in order to make realistic identifications of violations of international labour

standards. Secondly, they remain ineffective for preventing violations if there is no consequent analysis and study of the non-complying purchasing practices: pressure on production speed and costs, excessive sanctions, limited visibility on orders, etc., as shown in the report « *Cashing in!* » by the international network Clean Clothes Campaign⁵⁸, among others.

The duty of vigilance differs in this regard to the audits in that it removes the responsibility of compliance from the value chain links and places it on

the outsourcing company.

But none of the vigilance plans of the companies studied propose measures for this or acknowledge their responsibility as outsourcing companies to adopt responsible purchasing practices. If Carrefour touches on « *reciprocal commitments* » – without prioritising responsibility – the three retailers continue, as in their codes of conduct, to place full responsibility on their suppliers.

NO WORDS ON THE FIGHT AGAINST HIDDEN SUBCONTRACTING IN THE PLANS

The plans are much too evasive on the question of hidden subcontracting, which poses an aggravating and sector-specific risk of violations of fundamental labour rights.

Carrefour states that its « *code of conduct forbids resorting to hidden or undeclared subcontracting* » – Casino and Auchan's codes of conduct contain the same statement – and Auchan indicates that it carries out « *audits to detect non-transparent subcontracting* ». But the plans do not mention any precise measure for explicitly preventing this risk, which is notably linked to their own purchasing practices.

The companies do not specify the rank of suppliers that are taken into account in the risk mapping, particularly with regards to upstream of the value chain. Up to now, the United Nations' Guiding Principles on Business and Human

Rights have been considered the most complete text on the subject, in particular as they acknowledge a responsibility extending to the whole business relationship, given the weight the parent and outsourcing companies have on these economic bodies. This aspect is crucial in the textile industry since the way multinationals structure their production in complex and vast chains of subcontracting leads to a disappearance of traceability and an increase in the risk of undeclared subcontracting and resulting violations, getting out of hand. It is therefore especially surprising and regrettable that this issue is missing from the prevention measures.

Thus, the first plans of these three companies, having practically ignored the prevention measures, fail to meet the objective of the law: identify risks of violations, prevent them and implement monitoring mechanisms. A

good part of the content of the plans consists in stating the pre-existing CSR initiatives and commitments, which we remind, did not manage to prevent the worst accident in the industry and which no longer reassure consumers. We can hope that this is due to the time necessary to elaborate an appropriate plan covering the multiple environmental and social risks related to their operations, and not a matter of choice of these actors.

Only a complete reform of the business model of clothing multinationals could demonstrate a good implementation of the duty of vigilance and lead to a tangible improvement in respect for the fundamental rights of workers in this sector.

57. See in particular the report *Beyond social auditing*, by Fondation pour les droits de l'Homme au travail, 2008.

58. Accessible here: <https://cleanclothes.org/resources/publications/cashing-in.pdf/view>



GENERAL CONCLUSION AND PROSPECTS

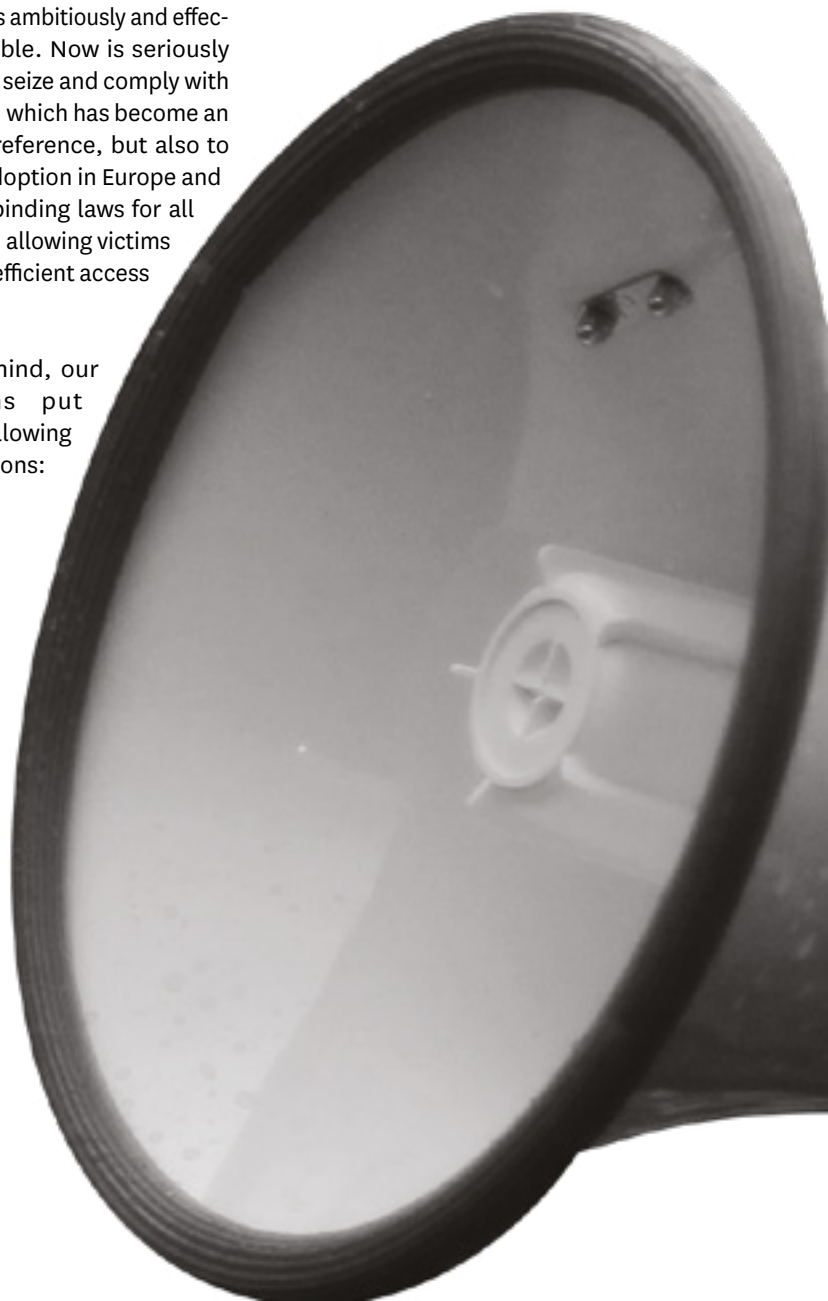
This study aims to be a guiding step towards an effective implementation of the law on duty of vigilance, designed to prevent violations of human rights and environmental damage resulting from the activity of multinationals, in particular in the sectors where these abuses are predominantly found. While the last months have still seen environmental or social disasters linked to some of these activities, it does not appear that French multinationals under this obligation fully recognise their legal responsibility when it comes to duty of vigilance or even of international texts. If the law is hardly or badly implemented, it is unrealistic to envision a reduction in violations against the environment or in which the victims are workers and populations across the world.

Wanting to avoid judicial procedures, sanctions, or having to answer to actions brought against them by consumers and citizens or being questioned by civil society are not effective driving forces for corporations to develop vigilance plans, as can be seen from the content of some of them. This is why regulation by public authorities is essential for the implementation of this law.

Our organisations believe this law could have been more ambitious, in particular concerning the companies covered and concerning the facilitation of access to justice for the victims. Indeed, it is not an end in itself, but

it poses an indispensable milestone in hard law. Designed with the aim to prevent risks, it constitutes a minimum standard for all companies. Consequently, we strongly urge for it to be implemented as ambitiously and effectively as possible. Now is seriously the moment to seize and comply with this obligation, which has become an international reference, but also to work for the adoption in Europe and worldwide of binding laws for all multinationals, allowing victims to finally have efficient access to justice.

With this in mind, our organisations put forward the following recommendations:



> For all companies subject to the law on duty of vigilance:

Taking into account the critical analysis and recommendations within this report and in Sherpa's Vigilance Plans Reference Guidance, and in conjunction with internal and external stakeholders:

-Comply with the legal duty to establish, publish and efficiently implement vigilance processes. In particular, to publish a detailed risk mapping as well as the methodology and bring particular attention to the development of efficient alert mechanisms. Equally, it is necessary that the companies clearly understand the concept of risk as defined by the law: this regards risks for third parties and the environment and not risks for the company or its investors.

> For all companies that are not subject to the law on duty of vigilance, in particular those implementing activities in "high risk" sectors:

· Design, publish and effectively implement mechanisms of vigilance, based on a serious sectoral analysis of human rights and environmental abuse risks.

> For the French public authorities:

Guarantee the effective implementation of the French law on duty of vigilance and reinforce it by:

- Publishing an annual list of the companies subject to the law;
- Designating an administrative body in charge of following the implementation of the law and which guarantees a centralised access to the vigilance plans of these companies;
- Creating an independent monitoring body to ensure the effective implementation of the law;
- Lowering the thresholds to include more companies that operate within sectors with high risk of human rights violations and environmental damage on the one hand, and reversing the burden of proof on the other hand.

> Support the internationalisation of multinationals' duty of vigilance by:

- Providing proactive and constructive support for the treaty on transnationals and human rights currently under negotiation in the United Nations;
- Working within the European Union towards its commitment to the process of and ambitious contribution to the draft treaty;
- Promoting the adoption of a binding European legislation on duty of vigilance.



LIST OF THE COMPANIES WHOSE VIGILANCE PLANS WERE REVIEWED

1	ACCOR	21	CASINO
2	ADP	22	CIC
3	AIR FRANCE-KLM	23	CLUB MED
4	AIR LIQUIDE	24	DANONE
5	AIRBUS	25	DASSAULT AVIATION
6	ALSTOM	26	DASSAULT SYSTÈMES
7	ALTEN	27	EDF
8	ARCELORMITTAL	28	ENEDIS
9	ARKEMA	29	ENGIE
10	ATOS	30	ERAMET
11	AUCHAN	31	ESSILOR INTERNATIONAL
12	AXA	32	FAURECIA
13	BIC	33	GALERIES LAFAYETTE
14	BNP PARIBAS	34	GRDF
15	BOLLORÉ	35	GROUPAMA
16	BOUYGUES	36	GROUPE BEL
17	BPCE	37	GROUPE RENAULT
18	BUREAU VERITAS	38	HSBC
19	CAPGEMINI	39	ILIAD
20	CARREFOUR	40	IMERYS

41	IPSOS	61	PSA
42	JCDECAUX	62	PUBLICIS GROUP SA
43	KEOLIS	63	REXEL
44	KERING	64	SAINT-GOBAIN
45	KORIAN	65	SANOFI
46	LA POSTE	66	SCHNEIDER ELECTRIC
47	LAGARDÈRE	67	SOCIÉTÉ GÉNÉRALE
48	LEGRAND	68	SUEZ
49	L'ORÉAL	69	TELEPERFORMANCE
50	LVMH	70	THALES
51	MICHELIN	71	TOTAL
52	NATIXIS	72	UBISOFT ENTERTAINMENT
53	NAVAL GROUP	73	VALEO
54	NEXANS	74	VALLOUREC
55	NEXITY	75	VEOLIA
56	ORANGE	76	VINCI
57	ORANO (EX AREVA)	77	VIVENDI
58	ORPEA	78	WENDEL
59	PERNOD RICARD	79	WORLDLINE
60	PLASTIC OMNIUM	80	ZODIAC AEROSPACE

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p.34 : Farm worker in a rice field, Chhenua village (India) – Credit : Florian Lang

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